FILE COPY

FILED
JUL 19 1946
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 318

LOUISE McGREW MOFFETT AND LOUISE McGREW MOFFETT AS EXECUTRIX OF THE ESTATE OF THOMAS S. MOFFETT, DECEASED,

Appellants,

vs.

COMMERCE TRUST COMPANY, A CORPORATION, HELEN WEEDE, B. C. HOWARD, AND WILLIAM H. KOPP

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSOURI

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

JOHN T. HARDING,
DAVID A. MURPHY,
R. CARTER TUCKER,
JOHN MURPHY,
WALTER A. RAYMOND,
Counsel for Appellee, Helen Weede;
CHARLES M. BLACKMAR,
JAMES E. GOODRICH,
HUGH M. HILLER,
EUGENE E. BOWERS,
Counsel for Appellee, Commerce Trust Company;
WM. DENNIS BUSH,
Counsel for Appellee, B. C. Howard;
GLEN A. WISDOM,
Counsel for Appellee, William H. Kopp.

BLEED THROUGH- POOR COPY

INDEX

Subject Index

Page

Appellees' suggestion opposing jurisdiction 1

Statement 1

Foreword to Discussion—Appellants have failed to show jurisdiction 2

I. The contention that this Court acquired jurisdiction by reason of the alleged point that Section 948 R. S. Missouri 1939 is violative of Section 10 Artice I of the Constitution of the United States is so clearly without foundation as to present no substantial or colorable federal question. The judgment rendered herein in conformity to said section was not upon the merits and is no bar to the commencement of another action 6

II. There is no provision of the Constitution or Statutes of the United States which gives the Appellants the right to maintain *jointly* in the courts of Missouri, the instant suit for their alleged cause or causes of action and no rights under the Constitution or laws of the United States were denied to Appellants by the holding of the court that there was a misjoinder of parties plaintiff 22

III. Appellants' claim that the demurrers to the Fifth Amended Petition were sustained without notice or hearing is not sustained by the record 30

IV. Appellants' contention that the Missouri Supreme Court erred in not

Page

deciding the case on appeal under the new Code of Civil Procedure although the case was tried below under the old code before the effective date of the new code is without merit and raises no federal question 34

V. There was no error by Division I of the Supreme Court of Missouri in denying the application of Appellants for transfer of the instant cause to the Supreme Court of Missouri en banc; Appellants could not claim such transfer as a matter of right; and there was no violation of the equal protection clause of Section 1 of Amendment XIV to the United States Constitution 44

VI. The records show that "most if not all" of the questions referred to by the Missouri Supreme Court on page 592 of its opinion in 193 S. W. (2d) 588, and also many other questions raised by Appellants on this appeal have been decided adversely to Appellants by courts of competent jurisdiction in suits brought by Appellants or in which they actively participated, and that Appellants have not only had their day in court but their months and years 52

VII. Judicial Notice—(a) This court will take judicial notice of its records in former cases companion to and inter-related with the instant case, and growing out of transactions pleaded in the instant case, where this Court has denied certiorari on such former cases. (b) The Supreme Court of Missouri in the instant case was entitled to take judi-

BLEED THROUGH- POOR COPY

Page

cial notice of its own records in former cases closely interwoven with, companion to and interdependent with the instant case and to take judicial notice of the public statutes and judicial decisions of the State of Kansas pleaded in the instant action. (c) The Circuit Court of Jackson County, Missouri, in the instant case was entitled to take judicial notice of all prior proceedings of said Circuit Court and of any divisoin thereof in the instant case, all of the divisions thereof constituting but a single court 71

VIII. Appellants' Assignment of Error No. 2 78

IX. In Appellants' First Assignment of Error (see also page 5, Appellants' Jursidictional Statement it is claimed that the Supreme Court of Missouri, 193 S. W. (2d) 588, denied Appellants their constitutional rights by holding that "the petition did not state a cause of action." The opinion itself (l. c. 592) shows the contrary 82

X. Comanche Case. *Helen Moffett* v. *T. S. Moffett, et al.*, 131 Kan. 546; same, 283 U. S. 826 91

XI. Jurisdiction is not vested in this Court by reason of Appellants' charge that Appellee instituted and maintained fictitious suits in the state courts alleged to be pursuant to an unlawful conspiracy 95

XII. Appellants are completely in error in in the contention that there is a right of action for conspiracy alone, inde-

Page

pendent of the damage caused by specific acts in furtherance of the conspiracy, either under the Statutes of the United States or of the State of Missouri. The "mere force of numbers" doctrine can have no application in the instant case 98

XIII. Appelants' charge of libel 101

XIV. Appellants complain that the opinion of the Supreme Court of Missouri, 193 S. W. (2d) 588, denied Appellants their constitutional rights by giving validity to the acts of those we will hereafter denominate as de facto judges. Appellants claim that those judges were illegally appointed and their acts are void 106

XV. Possible repetition is regretted 108

Motion to Dismiss or Affirm 109

In the "Suggestions" pages of printed records in Missouri Supreme Court are indicated thus: in the instant case (312); in the Howard Fee Case, 345 Mo. 741; 137 S. W. (2d) 507, (*312) 110

Appendix 110

Moffett v. *Moffett, et al.*, 131 Kan. 582, 292 Pac. 947 ..... 58, 69, 86, 106

Grace Torrance Clark, et al. v. *Helen Moffett, et al.* 136 Kan. 711, 18 Pac. (2d) 585 72

Moffett et al. v. *Robbins*, 81, F (2d) 431, 16, 54, 55, 59, 60

Louise McGrew Moffett et al. v. *R. O. Robbins, Administrator*, 14 Fed. Supp. 602 72

Specification of Errors contained in a Petition for Writ of Certiorari to review the decision of the Supreme Court of Kansas in the case of *Clark* v. *Moffett*, 136 Kan. 711, filed in United States Supreme Court on or about June 23, 1933, and docketed therein as cause No. 181 110

BLEED THROUGH- POOR COPY

Page

Specification of Errors contained in a Petition for Writ of Certiorari to review the decision of the Tenth Circuit Court of Appeals in the case of *Louise McGrew Moffett* v. *R. O. Robbins, Administrator,* 81 F. (2d) 431, filed in the United States Supreme Court on April 11, 1936, and docketed therein as cause No. 918 ... 110

Table of Cases Cited

Akins v. *Hicks,* 109 Mo. App. 96, 83 S. W. 75 23
Alaska Packers Association v. *Industrial Acci. Com.,* 294 U. S. 532, 79 L. Ed. 1044 9
A., T. & S. F. R. Co. v. *Railroad Com.,* 283 U. S. 380, 75 L. Ed. 1128 50
Amber v. *Choteau,* 107 U. S. 586 87
Anderson National Bank v. *Luckett,* 321 U. S. 233, 88 L. Ed. 692, 151 A. L. R. 824 10
Anson v. *Tietze,* 190 S. W. (2d) 193 40
Aspen Mfg. & Smelting Co. v. *Billings,* 150 U. S. 31, 37 L. Ed. 986 74
Aufderheide v. *Ice & Fuel Co.,* 319 Mo. 337, 4 S. W. (2d) 776 49
Baucke v. *Adams,* 188 S. W. (2d) 355 100
Beardslee v. *Morgner,* 73 Mo. 22 8
Beattie Mfg. Co. v. *Gerrardi,* 214 S. W. 189 90
Bell v. *Hood,* 90 Fed. Adv. sheets 758, 90 L. Ed. 758, 66 Sup. Ct. 773 ..... 17, 27
Bennett v. *Railway Co.,* 105 Mo. 642, 16 S. W. 947 49
Bennett v. *Southern Bank of Mexico,* 61 Mo. App. 297 8
Bienville Water Supply Co. v. *Mobile,* 186 U. S. 212, 46 L. Ed. 1132 75
Brady v. *Daly,* 175 U. S. 148, 44 L. Ed. 109 13
Brawner v. *Irvin,* 169 Fed. 964 99
Burke, In re, 45 N. W. 24 108
Case v. *Smith,* 215 Mo. App. 621, 257 S. W. 148 78
Central Vermont Ry. Co. v. *White,* 238 U. S. 507 3
Clark v. *Andrews,* 136 Kan. 123, 13 Pac. (2d) 294 73
Clark v. *Moffett,* 136 Kan. 711, 18 Pac. (2d) 555, 16, 54, 55, 57, 61, 62, 63, 73, 86, 88, 106

Page

Commonwealth v. *Stasio*, 8 N. E. (2d) 823 108
Corbett v. *Terminal Railroad Assn.*, 336 Mo. 972, 82 S. W. (2d) 97 74
Crawford v. *Arends*, 351 Mo. 1100, 176 S. W. (2d) 1 .. 40
Cummings v. *Missouri*, 4 Wall. 277, 18 L. Ed. 356 11
Dean v. *State*, 120 Fla. 60, 162 So. 155 12
DeBearn v. *Safe Deposit & Trust Co.*, 233 U. S. 24, 58 L. Ed. 833 75
Deming v. *Carlisle Packing Co.*, 226 U. S. 102, 57 L. Ed. 140, 33 S. Ct. 80 15
Department of Banking v. *Hedges*, 136 Nebr. 382, 286 N. W. 277 12
Dobbins v. *Gas Co.*, 182 Cal. 616, 189 Pac. 1073 12
Doyle v. *Loring*, 107 F. (2d) 337 42
Duval v. *Duval*, 316 Mo. 626 80
Erie R. Co. v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188 . 25
El Paso v. *West*, 104 F. (2d) 96 .....
Fadler v. *Gabbert*, 333 Mo. 851, 63 S. W. (2d) 121 .... 23, 29
Fears v. *Riley*, 148 Mo. 49, 49 S. W. 836 77
Frigorifico Wilson De Law Argentina v. *Wierton Steel Co.*, 31 Fed. Sup. 218 43
Fritzler v. *Boatmen's Bank*, 212 U. S. 364, 53 L. Ed. 551 74
Georgia v. *Pa. R. Co.*, 324 U. S. 439, 89 L. Ed. 1051 .. 27
Gordon v. *Burris*, 125 Mo. 39, 28 S. W. 191 18
Gorman v. *Washington University*, 316 U. S. 98, 62 Sup. Ct. 962 4
Guhlman v. *Growthe*, 346 Mo. 427, 142 S. W. (2d) 1 .. 96
Hallinger v. *Davis*, 146 U. S. 314, 36 L. Ed. 986, 13 Sup. Ct. 105 21
Howard Fee Case, 345 Mo. 741, 137 S. W. (2d) 507, 54, 66, 73, 80
Huddleston v. *Dwyer*, 322 U. S. 232, 64 S. Ct. 1015 ... 35
Hunter Co. v. *McHugh*, 320 U. S. 222, 64 Sup. Ct. 19 . 35
Huntington v. *Attrill*, 146 U. S. 657, 36 L. Ed. 1123 ... 13
Johnson v. *Drew*, 171 U. S. 93, 43 L. Ed. 88 21
Githcart v. *Ins. Co.*, 88 F. (2d) 410 85
Knorp v. *Thompson*, 352 Mo. 44, 175 S. W. (2d) 889 .. 54, 76
Kvasnicka v. *Montgomery Ward & Co.*, 350 Mo. 360, 166 S. W. (2d) 503 96

BLEED THROUGH- POOR COPY

Page

Lawrence v. *State Tax Commission*, 286 U. S. 276, 76 L. Ed. 1102, 52 Sup. Ct. 556, 87 A. L. R. 374 9
L. & N. Ry. Co. v. *Woodson*, 134 U. S. 614, 33 L. Ed. 1032 21
Life & Casualty Ins. Co. v. *McCray*, 291 U. S. 566, 78 L. Ed. 987 10
Lindsay v. *Evans*, 176 S. W. (2d) 390 95
Lober v. *Kansas City*, 339 Mo. 1087, 74 S. W. (2d) 815 38
Losch v. *Pickett*, 36 Kans. 222 87
Manning, In re, 45 N. W. 26 108
Memphis Natural Gas Co. v. *Beeler*, 315 U. S. 649, 62 Sup. Ct. 57 4
Midland Realty Co. v. *Kansas City Power & Light Co.*, 300 U. S. 109, 57 Sup. Ct. 345 37
Missouri ex rel. v. *Public Service Com.*, 273 U. S. 126, 71 L. Ed. 575 51
Missouri ex rel. Taylor, 266 U. S. 200, 69 L. Ed. 247, 45 Sup. Ct. 47, 42 A. L. R. 1232 24
Missouri Pac. Railroad Co. v. *Norwood*, 283 U. S. 249, 75 L. Ed. 1016 9
Mills Estate, In re, 162 S. W. (2d) 807 81
Minneapolis & St. Louis R. Co. v. *Bombolis*, 241 U. S. 211, 60 L. Ed. 961, 36 Sup. Ct. 595 Ann. Cas. 1916 E. 505 24
Mitchell v. *Greenough*, 100 F. (2d) 184 99
Moffett v. *Clark*, 131 Kans. 582 ..... 54, 57, 73
Moffett v. *Commerce Trust Co.*, 193 S. W. (2d) 588, 33, 38, 41, 89
Moffett v. *Moffett*, 131 Kan. 582, 292 Pac. 947, 77 A. L. R. 294 ..... 58, 69, 86, 106
Moffett v. *Moffett*, 131 Kan. 546, 292 Pac. 942 ..... 16, 93
Moffett v. *Robbins*, 298 U. S. 675, 80 L. Ed. 1397, 56 Sup. Ct. 940 16
Moffett v. *Robbins*, 81 F. (2d) 431 ..... 16, 54, 55, 59, 60
Moffett v. *Robbins*, 14 Fed. Supp. 602 ..... 54, 59, 67, 86
New Orleans Waterworks Co. v. *Louisiana*, 185 U. S. 336, 46 L. Ed. 936 21
Niederburg v. *Golluber*, 162 S. W. (2d) 592 29

	Page
Niehaus v. *Jos. Greenspon's Son Pipe Corp.*, 237 Mo. App. 112, 164 S. W. (2d) 180	24
Norton v. *Shelby*, 118 U. S. 426	107
O'Sullivan v. *Felix*, 233 U. S. 318, 58 L. Ed. 980	99
Parker v. *McLain*, 237 U. S. 469, 59 L. Ed. 1051	20
Pelz v. *Bollinger*, 180 Mo. 252	77
Picking v. *Pa. R. Co.*, 151 F. (2d) 240	26
Pitcairn v. *American Refrigerator Transit Co.*, 101 F. (2) 929	91
Plymouth Motor Corp, In re, 46 F. (2d) 212	101
Radio Station WOW v. *Johnson*, 326 U. S. 120, 65 Sup. Ct. 1475	5
Reppetto v. *Walton*, 313 Mo. 182, 281 S. W. 411	26
Rockwood v. *Crown Laundry Co.*, 352 Mo. 561, 178 S. W. (2d) 440	24, 26
Roe v. *Kansas ex rel. Smith*, 278 U. S. 191, 73 L. Ed. 259	15
Sabin v. *Home Owners Loan Corporation*, 151 F. (2d) 541	85
Sabol v. *St. Louis Cooperage Co.*, 31 S. W. (2d) 1041	76
Scheufler v. *Mfg. Lumb. Underwriters*, 349 Mo. 855, 163 S. W. (2d) 749	44
Scott v. *Alton Bank & Trust Co.*, 175 S. W. 920	29
Shaltupsky v. *Brown Shoe Co.*, 350 Mo. 831, 168 S. W. (2d) 1083	100
Shapleigh v. *Mier*, 299 U. S. 468, 81 L. Ed. 355, 57 Sup. Ct. 261	71
Sidway v. *Land & Live Stock Co.*, 197 Mo. 359, 94 S. W. 855	8
Simpson v. *Stoddard*, 173 Mo. 421	41
Southwestern Bell Telephone Co. v. *Oklahoma*, 303 U. S. 206, 58 Sup. Ct. 528	5
State v. *Bacon*, 61 Atl. 653	100
State v. *Dalton*, 134 Mo. App. 517	100
State v. *Douglas*, 50 Mo. 586	107
State v. *Duestrow*, 137 Mo. 44, 38 S. W. 544, 39 S. W. 266	45
State v. *Miller*, 111 Mo. 542	107
State ex rel. v. *Horner*, 187 S. W. (2d) 976	87

BLEED THROUGH— POOR COPY

Page

State ex rel. v. *Landwehr*, 332 Mo. 622, 60 S. W. (2d) 4 77
State ex rel. Burns v. *Woolfolk*, 303 Mo. 589 81
Thomson v. *Butler*, 136 F. (2d) 644 97
United States v. *Pink*, 315 U. S. 203, 86 L. Ed. 796, 62 Sup. Ct. 552 ..... 30, 52, 72
Waters-Pierce Oil Co. v. *Texas*, 212 U. S. 86, 53 L. Ed. 417 51
Webb v. *Bidwell*, 15 Minn. 479 12
Weber v. *Strobel*, 225 S. W. 925 96
Weitzman v. *Weitzman*, 156 S. W. (2d) 908 84
Wells v. *Davis*, 303 Mo. 388 23
Wilson Co. v. *Inst. Co.*, 300 Mo. 1, 254 S. W. 266 19
Wright v. *Central National Bank*, 37 F. (2d) 234 15
Yazoo, etc., R. Co. v. *Mullins*, 249 U. S. 351, 63 L. Ed. 754 50
Zombro v. *Moffett*, 44 S. W. (2d) 149 64

STATUTES CITED

Constitution of the United States:
Article I, Section 10 .....
Fourteenth Amendment 19, 22
Fair Labor Standard Act of 1938, 29 U. S. C. 201-219 ..... 25, 26
Federal Rules of Civil Procedure, Rule 86 .....
Missouri Code of Civil Procedure, Sec. 3 48
Missouri Constitution of 1875:
Secs. 3 and 5 of 1884 Amendments 47, 48
Article VI, Sec. 12 49
Missouri Constitution, Sec. 4 of 1890 Amendment 47
Missouri Constitution of 1945, Sec. 3 of Article V .....
Mo. Rev. St. 1939:
Section 948 ..... 6, 19, 79
Section 958 54
Section 4633 99
Mo. Rev. St. Ann. Sec. 847.3, Laws of Missouri 1943, page 357 37
45 Stat. 54 14

Page

U. S. Rev. St. Sec. 1010 (28 U. S. C. 878 14
U. S. Rev. St.:
Section 1979 (8 U. S. C. 43) 23, 24, 98
Section 1080 (8 U. S. C. 47) 23, 24, 98
Section 1981 (8 U. S. C. 48) 23, 24, 98
U. S. Rev. St. Sec. 4966 .....
18 U. S. C. 51 99
18 U. S. C. 52 99
28 U. S. C. 344 (Judicial Code, Sec. 237) 50, 97
28 U. S. C. 878 14

OTHER AUTHORITIES CITED

11 Amer. Jur. Prud. "Constitutional Law" Sec. 83, p. 705 10
33 C. J. page 1038 108
36 C. J. page 1039 107

BLEED THROUGH- POOR COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 318

LOUISE McGREW MOFFETT AND LOUISE McGREW MOFFETT AS EXECUTRIX OF THE ESTATE OF THOMAS S. MOFFETT, DECEASED,

Appellants,

vs.

COMMERCE TRUST COMPANY, A CORPORATION, HELEN WEEDE, B. C. HOWARD, AND WILLIAM H. KOPP,

Appellees

APPELLEES' SUGGESTIONS OPPOSING JURISDICTION, AND MOTION TO DISMISS APPEAL OR AFFIRM JUDGMENT

Statement

The Appellees, believing that the matters set forth below will demonstrate the lack of substance in the questions raised by this appeal, file this, their statement in opposition to Appellants' statement as to jurisdiction. Appellees include herein and at the end hereof their motion to dismiss the appeal, or, in the alternative, to affirm the judgment

of the Supreme Court of Missouri, on the ground that the questions raised on behalf of Appellants are so unsubstantial as not to sustain the jurisdiction of this Court and not to require further argument. Appellees assert that the unsubstantial character of the grounds stated by Appellants is so apparent on the face of the record as to defeat the jurisdiction of this Court and to warrant summary disposal of the appeal by the Court at this stage of the proceeding. The matters here relied upon by the Appellees are more particularly stated in the following parts of this statement.

Foreword to Discussion

The Appellees have heretofore been and now are separately represented by their respective counsel. However, to avoid unnecessary repetition and conserve the time and labor of this Court, Appellees have joined in the suggestions and motion hereinafter set out. We regret the length of these suggestions but feel compelled to discuss the question involved at some length because of the long, involved and confusing Assignments of Error and Jurisdictional Statement filed by Appellants. Appellants' Assignments of Error cover some six and one-half crowded pages of typewriting. Their Jurisdictional Statement covers more than thirty-three crowded typewritten pages, exclusive of exhibits.

On Page 46 of the Jurisdictional Statement, there appears the following:

> "Appellants adopt and make Motion for rehearing and to Transfer to the Court en banc in the state supreme court, and Assignments of Error herein filed, a part hereof, as fully as if set forth as a part of this jurisdictional statement."

Examination of this motion discloses that it consists of twenty-four pages, and, further, that most of the contentions

BLEED THROUGH– POOR COPY

therein were relative to non-Federal questions. We respectfully submit in passing that it is violative of at least the spirit of the Rules of this Court in proceedings of this character for the Appellants to incorporate in a jurisdictional statement by reference a lengthy document of this character. We feel that the jurisdictional statement should not go beyond the confines of the Assignments of Error, which are a part of the appeal papers to this Court. We believe Appellants' Assignments and Jurisdictional Statement merit the condemnation given plaintiff in error's assignments in the case of *Central Vermont Railway Co.* v. *White, Administratrix,* 238 U. S. 507, where the Court said:

> "• • • The case was brought here on a record containing so many assignments, covering 18 printed pages, as to make it proper to repeat the ruling in Phillips *v.* Seymour, 91 U. S. 648, that the 'practice of filing a large number of assignments cannot be approved. It perverts the purpose sought to be subserved by the rule requiring any assignments.' 'It points to nothing and thwarts the purpose of the rule' (Chicago, Great Western Ry. Co. *v.* McDonough, 161 Fed. Rep. 659) which was intended to present to the court a clear and concise statement of material points on which the plaintiff in error intends to rely."

Appellants here might just as well point to the sky as to their assignments of error and jurisdictional statement. The one would be about as indefinite as the other.

This Court in the *Central Vermont Railway* case, *supra,* said further (238 U. S. l. c. 509):

> "Some of the assignments in the present case relate to matters of pleading; others to the admissibility of evidence, to the sufficiency of exceptions, and to various rulings of the trial court which involved no construction of the Employers Liability Act and which, therefore, cannot be considered on writ of error from a state court. Seaboard Air Line *v.* Duvall, 225 U. S. 477, 487."

That case was an appeal from a Vermont judgment. What is there said is applicable to most of the matters complained of here, to-wit: they are matters of State practice, involve no Federal question, and a State court judgment thereon is final and conclusive.

Preliminary to our discussion of the jurisdiction questions involved, we desire to call attention to a few fundamental rules. Appellants are here invoking the appellate jurisdiction of this Court to review the judgment of the Missouri Supreme Court. The burden is therefore upon appellants to demonstrate this Court has jurisdiction. In the case of *Gorman* v. *Washington University*, 316 U. S. 98, 62 S. Ct. Rep. 962, this Court said: (l. c. 964)

> "Upon application to this Court for review of the judgment of a state court it is the petitioner's burden to show affirmatively that we have jurisdiction. Memphis Natural Gas Co. *v.* Beeler, 315 U. S. 649, 62 S. Ct. 857, 86 L. Ed. —."

The opinion in the case cited in the quotation above, *Memphis Natural Gas Company* v. *Beeler*, 315 U. S. 649, 62 S. Ct. 57, states: (l. c. 859)

> "The case comes here by appeal from a judgment of the Supreme Court of Tennessee, which sustained the tax and reversed a decree of the Tennessee chancery court enjoining its collection. * * * The Judicial Code was intended to restrict our obligatory appellate jurisdiction to a narrow class of cases, and to foreclose an appeal as of right whenever the prescribed conditions have not been rigorously fulfilled."

To discharge the burden upon them and demonstrate this Court has jurisdiction herein, Appellants must prove that there was a substantial Federal question involved upon which the State Court decision necessarily rests. The requirements in this connection are well stated by this Court

BLEED THROUGH– POOR COPY

in the case of *Southwestern Bell Telephone Company* v. *State of Oklahoma*, 303 U. S. 206, 58 S. Ct. Rep. 528, as follows: (l. c. 530)

> "We have repeatedly held that it is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause; that the federal question was actually decided or that the judgment as rendered could not have been given without deciding it. DeSaussure *v.* Gaillard, 127 U. S. 216, 234, 8 S. Ct. 1053, 32 L. Ed. 125; Johnson *v.* Risk, 137 U. S. 300, 306, 307, 11 S. Ct. 111, 34 L. Ed. 683; Wood Moving & Reaping Machine Co. *v.* Skinner, 139 U. S. 293, 295, 297, 11 S. Ct. 528, 35 L. Ed. 193; Whitney *v.* California, 274 U. S. 357, 360, 361, 47 S. Ct. 641, 642, 643, 71 L. Ed. 1095; Lynch *v.* New York, 293, U. S. 52, 54, 55 S. Ct. 16, 17, 79 L. Ed. 191."

In the case of *Radio Station WOW* v. *Johnson*, 326 U. S. 120, 65 S. Ct. Rep. 1475, this Court stated the rule as follows: (l. c. 1480)

> "Here the Nebraska Supreme Court held that the federal question had dropped out as a matter of pleading and also denied its merits. This brings the situation clearly within the settled rule whereby this Court will not review a State court decision resting on an adequate and independent non-federal ground even though the State court may have also summoned to its support an erroneous view of federal law. 'Where the judgment of the state court rests on two grounds, one involving a federal question and the other not • • • and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction.' Lynch *v.* New York, 293 U. S. 52, 54, 55, 55 S. Ct. 16, 17, 79 L. Ed. 191."

We are confident Appellants have failed to meet the above tests and discharge their burden to prove jurisdiction in this Court by reason of a substantial Federal question actually passed upon and necessary to the decision of the State court. We shall now attempt to demonstrate that Appellants have failed to discharge this burden and because thereof, this appeal should be dismissed.

I

The contention that this Court acquired jurisdiction by reason of the alleged point that Section 948 R. S. Missouri, 1939, is violative of Section 10, Article I of the Constitution of the United States is so clearly without foundation as to present no substantial or colorable Federal question. The judgment rendered herein in conformity to said section was not upon the merits and is no bar to the commencement of another action. (Appellants assignment of errors numbers 14, 15 and 18)

By reference to the opinion of the Supreme Court of Missouri in the instant case, 193 S. W. 2 588, it is readily apparent that the only Federal question which the Supreme Court of Missouri had occasion to pass upon, and did pass upon, in arriving at its decision that the judgment of the court below was right in sustaining the demurrers and dismissing the petitions for misjoinder of parties plaintiff (a procedural question) was the contention that Section 948 R. S. Mo. 1939 was in effect a bill of pains and penalties and a violation of the provisions of Article I, Section 10, of the Federal Constitution which prohibits a State from passing a bill of attainder.

Section 948 R. S. Mo. 1939 is as follows:

"Sec. 948. Proceedings if third pleading is insufficient.

BLEED THROUGH— POOR COPY

"If a third petition, answer or reply be filed and adjudged insufficient as above, or the whole or some part thereof be stricken out, the party filing such pleading shall pay treble costs; and no further petition, answer or reply shall be filed, but judgment shall be rendered. R. S. 1929, #796."

It is the third of a series of correlated sections which were first enacted by the State of Missouri in 1825, the first of which, section 946 id., provides that when a petition, answer or reply shall be adjudged insufficient in whole or in part upon demurrer or the whole or some part thereof stricken out on motion, the party may file a further like pleading within such time as the court shall direct; and in default thereof, the court shall proceed with the cause as if no such original pleading had been filed.

The second section, 947 id., provides that if such a second pleading be filed and adjudged insufficient or stricken in whole or in part, the party filing the same shall pay double costs, and file a like pleading instanter; or in default thereof, the court shall proceed as if no second pleading had been filed. It will be noted that Section 948 id., simply provides for treble costs, forbids the filing of any further like pleading and commands that judgment shall be rendered.

Section 948 id., thus attacked not only has been upon the statute books of the State of Missouri for one hundred twenty years, but intensive research has failed to disclose any previous attack upon its validity under either the Federal or State constitutions. On the contrary, it has been construed, applied and enforced universally by the trial courts of Missouri, with the approval of the Supreme Court and other appellate courts of that State when exercised in accordance with their interpretation of its meaning and effect.

The provisions of Section 948 id., are wise, salutary and remedial. The reasons which in the opinion of the appellate

courts of Missouri, influenced the Legislature to enact that section have been cogently set forth in the decisions cited below, among others.

In *Beardslee* v. *Morgner*, 73 Mo. 22, the Supreme Court of Missouri, in a decision rendered in the year 1880, said with reference to the section in question:

> "The legislature, no doubt, thought a pleader who could not draw a good petition in three trials ought to go out of court, and not detain his adversary any longer by his blundering dilatoriness. Whatever they may have thought, this is what they commanded, and that command we are not at liberty to ignore."

In *Sidway* v. *Land & Live Stock Co.*, 197 Mo. 359, l. c. 371-373, 94 S. W. 855, a decision rendered in the year 1906, the court elaborately construes and applies the meaning and intent of this section thus:

> "The lawmakers doubtless thought that some time should be fixed in which efforts to litigate should cease, and they therefore provided that, when a third petition was filed and adjudged insufficient, it was the duty of the court to end such efforts at litigation, and render judgment providing that the party filing such petition should pay treble costs, and prohibiting the filing of any further petitions." (But such judgment does not bar another action. This is briefed *infra*.)

Bennett v. *Southern Bank of Mexico*, 61 Mo. App. 297 was decided by the Kansas City Court of Appeals, in an able opinion which has been cited with approval by the Supreme Court of Missouri. The Court of Appeals in its opinion on rehearing, said of the section in question:

> "The offending party is punished for the negligent or unskillful manner of drafting his pleading."

The foregoing, together with other similar opinions of the Missouri appellate courts are well summarized in the

BLEED THROUGH– POOR COPY

opinion in the instant case (193 S. W. 2d 588, l. c. 592) wherein the court says of Section 948 id.:

> "This statute, until the effective date of our new Code, was in force for one hundred twenty years. It has frequently been construed by this and other courts and, so far as we know, its constitutionality has never been assailed before. • • • It applies only to civil procedure, inflicts no penalty without a hearing, authorizes neither fine nor imprisonment, but only a money judgment for unreasonably consuming the time of courts and litigants and causing needless expense by filing defective petitions. Its constitutionality is presumed and appellants have offered nothing to rebut the presumption."

The presumption of constitutionality which attaches to every State statute unquestionably attaches in this case. *Alaska Packers Association* v. *Industrial Acci. Com.*, 294 U. S. 532 l. c. 543; 79 L. Ed. 1044, l. c. 1049. And the burden rests upon the appellants to overcome that presumption and to demonstrate plainly any asserted invalidity. *Missouri Pac. Railroad Co.* v. *Norwood*, 283 U. S. 249, l. c. 254, 255, 75 L. Ed. 1016, wherein this Court said:

> "The state laws are presumed valid. • • • The burden is on the plaintiff by candid and direct allegations to set forth in its complaint facts sufficient plainly to show the asserted invalidity. Aetna Ins. Co. *v.* Hyde, 275 U. S. 440, 447, 72 L. Ed. 357, 364, 48 S. Ct. 174, and cases there cited. New Orleans Pub. Service *v.* New Orleans, 281 U. S. 682, 686, 74 L. Ed. 1115, 1118, 50 S. Ct. 449; Beaumont, S. L. & W. R. Co. *v.* United States, 282 U. S. 74, 88, ante, 221, 51 S. Ct. 1."

Appellants have the burden of overcoming the presumption of facts supporting constitutionality, which attaches to all State legislative acts. *Lawrence* v. *State Tax Commission*, 286 U. S. 276, 76 L. Ed. 1102, 52 S. Ct. 556, 87 A. L. R. 374.

Section 948 R. S. Mo. 1939 has stood unchallenged as to constitutionality upon the statute books of the State of Missouri for one hundred twenty years. The presumption of validity which applies to legislation generally is fortified by acquiescence through a number of years. 11 Amer. Jur. Prud. "Constitutional Law", Sec. 83, page 705.

With respect to the constitutionality of giving of notice of proceedings affecting property within the county by posting on the Court House door which had been authorized by statutes of the State of Kentucky, as to various subjects and at various times since 1796, the late Chief Justice Stone, speaking for this Court, said in *Anderson National Bank* v. *Luckett*, 321 U. S. 233, 88 L. Ed. 692, 151 A. L. R. 824, that:

> "The fact that a procedure is so old as to have become customary and well known in the community is of great weight in determining whether it conforms to due process, for 'Not lightly vacated is the verdict of quiescent years.' (citing cases)"

In *Life & Casualty Ins. Co.* v. *McCray*, 291 U. S. 566, 78 L. Ed. 987, there was a challenge to the constitutionality of a statute of the State of Arkansas by which an insurance company failing to pay a loss within the time specified in the policy, after demand made therefor, was made liable to the policy holder in addition to the amount of the loss, for twelve (12) per cent damages thereon and reasonable attorneys fee. This Court, speaking through Mr. Justice Cardozo, refers to the act in question as a sample of a type of statutes adopted in other States, referring particularly to the similar Texas Statutes first enacted in 1879 and upheld by this Court. The opinion then proceeds:

> "During the half century and more in which the act has been in force, no one, it seems, has protested to any court that the percentage is immoderate. The same statute came before us again in Iowa L. Ins. Co. v.

BLEED THROUGH– POOR COPY

Lewis, supra, (187 U. S. 355, 47 L. ed. 213, 23 S. Ct. 126). We renewed our approval, and said of our earlier opinion (Fidelity Mut. Life Asso. *v.* Mettler): 'We are • • • entirely satisfied with the case and its reasoning.' p. 355. Cf. Farmers' & M. Ins. Co. *v.* Dobney, supra (189 U. S. 305, 47 L. ed. 826, 23 S. Ct. 565). The presumption of validity which applies to legislation generally is fortified by acquiescence continued through the years. Corn Exch. Bank *v.* Coler, 280 U. S. 218, 74 L. ed. 378, 50 S. Ct. 94; Ownbey *v.* Morgan, 256 U. S. 94, 65 L. Ed. 837, 41 S. Ct. 433, 17 A. L. R. 873."

The presumption of the constitutionality of Section 948 R. S. Mo. 1939 is fortified by the acquiescence of the bench, the bar and the public in its validity throughout one hundred twenty years. That presumption becomes a certainty when we test the challenged sections by the classic definition of a bill of pains and penalties, as formulated by this Court in *Cummings* v. *Missouri*, 4 Wall. 277, l. c. 323, 18 L. Ed. 356 l. c. 363, wherein it is held:

> "A bill of attainder is a legislative act, which inflicts punishment without a judicial trial.
>
> "If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties. In these cases the legislative body, in addition to its legitimate functions, exercise the powers and office of judge; it assumes, in the language of the textbooks, judicial magistracy; it pronounces upon the guilt of the party, without any of the forms or safeguards of trial; it determines the sufficiency of the proofs produced, whether conformable to the rules of evidence or otherwise; and it fixes the degree of punishment in accordance with its own notions of the enormity of the offense."

Section 948 id. does not authorize either fine or imprisonment, but only a civil penalty imposed not for the vindica-

tion of public authority but as a compensation to the injured party, and this only after the third pleading be "adjudged insufficient". The word "adjudged" means a *judicial* determination of fact and entry of *judgment*.

Department of Banking v. *Hedges*, 136 Nebr. 382, 286 N. W. 277. It means a judgment entered by a court of competent jurisdiction. *Webb* v. *Bidwell*, 15 Minn. 479, 484; *Dobbins* v. *Gas Co.*, 182 Cal. 616, 189 Pac. 1073, 1082; *Dean* v. *State*, 120 Fla. 60, 162 So. 155. As stated at the beginning of this point, sections 946, 947 and 948 R. S. Mo. 1939 dealing with the first, second and third pleadings in each instance provide that before the consequences specified in the particular section shall be adjudged, the pleading shall have been adjudged insufficient. Consequently, the command of Section 948 id., that no further pleading shall be filed but judgment shall be rendered, can only apply when each of the three pleadings in question shall have been already determined to be insufficient by the judgment of the court.

This Court has repeatedly recognized and applied the distinction between penalties which are imposed as a punishment for crime and those which are *per se* civil in nature, affording only a remuneration to a private party for injury sustained in course of litigation. In *Life & Cas. Ins. Co.* v. *McCray*, *supra*, with reference to recovery of percentage damages and attorneys fee, for delayed payment of insurance losses, Mr. Justice Cardozo said for this Court that:

> " 'Penalty' is a term of varying and uncertain meaning. There are penalties recoverable in vindication of the public justice of the state. There are other penalties designed as reparation to sufferers from wrongs. Huntington *v.* Attrill, 146 U. S. 657, 668, 36 L. Ed. 1123, 1127, 13 S. Ct. 224; Brady *v.* Daly, 175 U. S. 148, 154, 157, 44 L. ed. 109, 112, 113, 20 S. Ct. 62; St. Louis,

BLEED THROUGH– POOR COPY

I. M. & S. R. Co. *v.* Williams, 251 U. S. 63, 66, 64 L. ed. 138, 140, 40 S. Ct. 71; Loucks *v.* Standard Oil Co., 224 N. Y. 99, 103, 120 N. E. 198. • • • the penalty may be no more than the fair price of the adventure. St. Louis, I. M. & S. R. Co. *v.* Williams, supra, (251 U. S. 66, 64 L. ed. 140, 40 S. Ct. 71). In that event, the litigant must pay for his experience, like others who have tried and lost." (291 U. S. l. c. 574, 575, 78 L. ed. l. c. 992.)

In *Brady* v. *Daly*, 175 U. S. 148 l. c. 157, 44 L. Ed. 109, l. c. 113, this Court said in discussing the nature of an action at law to recover damages for infringement of copyright under U. S. R. N. Statutes Section 4966, that:

> "Although punishment, in a certain and very limited sense, may be the result of the statute before us so far as the wrongdoer is concerned, yet we think it clear such is not its chief purpose, which is the award of damages to the party who had sustained them, and the minimum amount appears to us to have been fixed because of the inherent difficulty of always proving by satisfactory evidence what the amount is which has been actually sustained."

And in *Huntington* v. *Attrill*, 146 U. S. 657, l. c. 667, 36 L. Ed. 1123, l. c. 1127, this Court held:

> "In the municipal law of England and America, the words 'penal' and 'penalty' have been used in various senses. Strictly and primarily, they denote punishment, whether corporal or pecuniary, imposed and enforced by the State, for a crime or offense against its laws. United States *v.* Reisinger, 128 U. S. 398, 402 (32: 480, 481); United States *v.* Chouteau, 102 U. S. 603, 611 (26: 246, 249). But they are also commonly used as including any extraordinary liability to which the law subjects a wrongdoer in favor of the person wronged, not limited to the damages suffered. • • •
>
> "Statutes giving a private action against the wrongdoer are sometimes spoken of as penal in their nature,

but in such cases it has been pointed out that neither the liability imposed nor the remedy given is strictly penal."

Appellants have presented nothing to sustain their contention that Section 948 id., is a bill of pains and penalties. In the opinion in the instant case the Supreme Court of Missouri said (193 S. W. 2 588 l. c. 592) of this section:

> "Its constitutionality is presumed and appellants have offered nothing to rebut the presumption".

In their jurisdictional statement to this Court, and particularly in "A. The Federal Questions Involved Herein are Substantial" thereof, they submit nothing to rebut the presumption of constitutionality of that section, or in support of their contention of unconstitutionality made under point 14 of their assignment of error.

With respect to the claimed aspect of Section 948 id., as an alleged bill of pains and penalties a noteworthy parallel is found in Section 1010 R. S. Title 28 U. S. C., Section 878, reading as follows:

> "878. Damages and costs on affirmance. Where, upon a writ of error, judgment is affirmed in the Supreme Court or a circuit court of appeals, the court shall adjudge to the respondents in error just damages for his delay, and single or double costs, at its discretion.

This section had its origin in the Judiciary Act of 1789. (Historical note to Sec. 878 Title 28 U. S. C. A.) This section gives authority to award damages for delay where in form, there is no judgment of affirmance but only an order for the dismissal of a writ of error to a State court (or an appeal therefrom, since enactment of 45 Stat. 54 Sec. 861-a U. S. C. substituting appeal for writ of error) because of the unsubstantial and frivolous character of the as-

BLEED THROUGH— POOR COPY

serted Federal writ. *Deming* v. *Carlisle Packing Co.*, 226 U. S. 102, 57 L. Ed. 140, 33 S. Ct. 80.

In *Roe* v. *Kansas ex rel. Smith*, 278 U. S. 191, l. c. 193, 73 L. Ed. 259, l. c. 261, with reference to the above quoted statute this Court held:

> "This writ of error to the supreme court of Kansas must be dismissed. The alleged grounds therefor are so lacking in substance that they may be properly designated as frivolous.
>
> • • • • • • •
>
> "In Slaker *v.* O'Connor (No. 61) (278 U. S. 188, ante, 258, 49 Sup. Ct. Rep. 158), we have referred to the statutes and rule which give us authority to impose penalties and costs where causes are brought here upon frivolous appeals or writs of error. The alleged ground for the present writ is without substance, and the circumstances justify the imposition of a penalty upon the party at fault.
>
> "The writ of error will be dismissed and a penalty of $200 payable to the defendants in error, together with all costs, will be taxed against the plaintiff in error,"

And it is worthy of note that in the last cited case this Court declined to hear counsel for the defendants in error, and the inference is that such action was by reason of the unsubstantial grounds asserted in support of the claimed Federal jurisdiction.

In *Wright* v. *Central National Bank*, 37 Fed. 2 234, certiorari denied 281 U. S. 755, 74 L. Ed. 1165, 50 S. Ct. 409, the defendants in an action at law had previously defended the action against them and appealed from the resulting judgment, which was affirmed. The reported case was an appeal from the judgment of the United States District Court dismissing an action in equity to enjoin enforcement

of the judgment previously recovered at law. The Circuit Court of Appeals, in dismissing the appeal, held:

> "The defendants in the law action had full opportunity to defend. They answered and did defend in that case and appealed from the judgment against them, which was affirmed. This appeal is wholly without merit, vexatious and frivolous. The penalty provided in sections 878 and 880 of title 28 U. S. Code (28 U. S. C. A. #879, 880) should be applied here. Slaker, Adm'r *v.* O'Connor, 278 U. S. 188, 49 S. Ct. 158, 73 L. Ed. 258; Roe *v.* Kansas ex rel Smith, Atty. Gen., 278 U. S. 191, 49 S. Ct. 160, 73 L. ed. 259."

It is not amiss here to remind the court that the appellants herein, after following the same course as did the appellants in *Wright* v. *Central National Bank, supra,* after this Court in *Moffett* v. *Robbins,* 298 U. S. 675, 80 L Ed. 1397, 56 S. Ct. 940, had denied certiorari to review the decision of the Circuit Court of Appeals in *Moffett* v. *Robbins,* 81 Fed. 2 431, proceeded to bring the present action for damages in the Circuit Court of Jackson County, Missouri. We believe that this litigation is practically unparalleled in the history of American jurisprudence. In addition to the fact that this Court denied certiorari to review the decision of the Circuit Court of Appeals against the appellants herein and therein on the suit to enjoin the judgments in the Kansas State Court, this Court previously had denied certiorari to review the decision of the Supreme Court of Kansas in *Moffett* v. *Moffett,* 131 Kan. 582, 292 Pac. 947, 77 A. L. R. 294, Certiorari denied 283 U. S. 827, 75 L. Ed. 1440, and this Court likewise had denied certiorari to review the decision of the Supreme Court of Kansas in *Clark* v. *Moffett,* 136 Kan. 711, 18 Pac. 2 555, certiorari denied 290 U. S. 642, 78 L. Ed. 558; leave to file petition for rehearing denied 290 U. S. 602, 78 L. Ed. 528.

BLEED THROUGH– POOR COPY

In *Bell* v. *Hood*, decided by this Court on April 1, 1946, 90 Fed. advance sheets 758, this Court speaking through Mr. Justice Black, said that:

> "• • • a suit may sometimes be dismissed for want of jurisdiction where the alleged claim under the Constitution or federal statute clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous."

We submit that the last quoted statement is entirely applicable to the contentions of appellants with respect to Section 948 id. Appellants in addition to their assignment of error number 14, in which they attack Section 948 id., as a bill of attainder, make two further assignments of error with respect to the same section of the statute as follows:

> "15. The court erred in denying appellants' rights under the XIVth Amendment by affirming the judgment dismissing the case and assessing the penalty provided by Section 948 on the alleged ground that three petitions had been held insufficient on demurrer.
>
> • • • • • • •
>
> "18. The court erred in denying appellants' rights under the XIVth Amendment by its judgment of dismissal and assessing a penalty against appellants."

These assignments are elaborated in their Jurisdictional Statement under "How Federal Questions Were Raised," by the allegations that "said action was dismissed by the court and appellants' right to recover or to institute any further action forfeited, and a statutory penalty in favor of appellees adjudged against appellants, • • •" and under "B," "The Missouri Partnership Administration Statute conflicts with the XIIITH XIVTH Amend-

ments and Treaty with France of April 30, 1803," wherein appellants say of Section 948 id., that:

> "*Said statute, as applied herein by the trial court,* was void because contrary to the law of the State and Nation, in that the trial court, without a hearing, and by denying appellants' request for a hearing (421) required by the rules (402-406), was binding on the court (Meierhoffer *v.* Hansell, 294 Mo. 195). *That judgment (424-425) forfeited appellant'- right to maintain the action or to institute another,* and, with its assessment of a penalty, made said statute a mere legislative decree and a true bill of pains and penalties." (Italics added for emphasis.)

They assert the dismissal affirmed on appeal in the instant case deprived appellants of the right to bring and maintain any action claiming damages for their alleged loss and thus was as much a bill of attainder as if a punishment had been directly imposed.

The challenged judgment, under the unvarying decisions of the Supreme Court of Missouri, has no greater effect than any other judgment on demurrer and is not a bar to the commencement or maintenance of another action. In *Gordon* v. *Burris,* 125 Mo. 39, 28 S. W. 191, the Supreme Court held, with respect to the instant contention that:

> "As the party in fault because of having filed *three* defective pleadings is required to pay treble costs, it is to be presumed that judgment is to be rendered for such costs. But there is no intimation in the section that a judgment is to be rendered on the *merits,* or that such judgment shall be a *bar* to any future proceedings involving the same facts."

In *Bennett* v. *Bank,* 61 Mo. App. 297, l. c. 301, the Kansas City Court of Appeals held as to the effect of Section 948 id., as a bar to further action, as follows:

> "It seems plain to my mind that a judgment entered on the third demurrer is of no greater force than if

BLEED THROUGH– POOR COPY

the plaintiff had, on the first or second adverse ruling, declined to amend, and judgment had been entered against him. A judgment in either case is a judgment on demurrer, and the one is as effective to shut off future litigation as the other."

Appellants under subdivision "D" of their Jurisdictional Statement asserting "There Was No Misjoinder of Causes of Action or of Parties Plaintiff" rely upon *Wilson Co.* v. *Inst. Co.*, 300 Mo. 1, 254 S. W. 266. In the course of the opinion therein, the Supreme Court of Missouri holds (300 Mo. 1, l. c. 36) with respect to Section 948 id., as a bar, as follows:

> "But it is equally as well settled that such final adjudication, in order to be a bar, must have been on the merits. In other words, a judgment on demurrer is not a bar to a subsequent suit between the same parties touching the same cause of action. (Wells *v.* Moore, 49 Mo. 229; Freeman on Judgments, (4 Ed.) sec. 260; Bennett *v.* Southern Bank, 61 Mo. App. 297.) The statute above referred to authorizes the court upon sustaining the third demurrer to do no more than enter the usual judgment on demurrer, give judgment for the penalty of treble costs and dismiss the petition, thus leaving the plaintiff free to institute a new suit if he chooses to do so. (Gordon *v.* Burris, 125 Mo. 39, 28 S. W. 191; Bennett *v.* Southern Bank, 61 Mo. App.)"

The foregoing authorities completely refute the contention by appellants that Section 948 id., imposed a penalty upon them or deprived them of any rights under Amendment XIV to the Constitution of the United States. Section 10 of Article I of the Constitution provides that

> "No State shall • • • pass any Bill of Attainder • • •."

Section 948 R. S. Mo. 1939 makes no provision that the party whose petition is dismissed thereunder shall be bar-

red from bringing another action as the Supreme Court of Missouri has repeatedly held in the above cited cases and others. The Supreme Court of Missouri in its opinion in the instant case (193 S. W. 2d 588) held that the judgment of the trial court was proper under Section 948 id., as thus theretofore interpreted by the Missouri Supreme Court.

Thus there is no point or substance to the appellants' assignments of error number 15 and number 18, since the challenged judgment did not deprive the appellants or either of them of any right which they may have to bring or maintain another action; and neither under said assignments nor under appellants' assignment of error number 14, is there any plain, substantial, non-frivolous assertion of any Federal right which could be defeated by the application of the local rule of practice prescribed by Section 948 id. The question of local practice is not interwoven with the decision of any question of national authority, because appellants, to sustain their contention that the instant judgment is not based on a non-Federal ground were compelled to assert the proposition that the challenged judgment was on the merits in the sense of being a bar to a further action, which contention the above cited Missouri authorities absolutely refute, and thus render inapplicable the authorities cited by appellants under "C" of their Jurisdictional Statement. In *Parker* v. *McLain*, 237 U. S. 469, 59 L. Ed. 1051, on a similar proposition, this court held the decision of the State Supreme Court controlling. It said:

> "Whether by consenting to the revivor, and thus recognizing the executrix as the real party in interest (see Gen. Stat. (Kan.) #6023), the defendant was estopped from subsequently challenging her capacity to maintain the action, was purely a question of local law or practice, and its decision by the supreme court of the state is controlling."

BLEED THROUGH– POOR COPY

In *Johnson* v. *Drew*, 171 U. S. 93, 43 L. Ed. 88, this court, through Mr. Justice Brewer held:

> "The ruling of the trial court in sustaining the demurrer to the first equitable plea and refusing leave to permit the second to be filed presents no question for the consideration of this court, for it was held by the supreme court of the state that under the plea of not guilty all the matters of defense set up in these equitable pleas could be offered in evidence and made available; and, in fact, the defendant on the trial did offer his testimony to establish them. So, the substantial rights of the defendant were not prejudiced, and the ruling involved merely a question of state practice."

The question being thus one of local practice the reason for the rule was forcefully stated by this court in *New Orleans Waterworks Co.* v. *Louisiana*, 185 U. S. 336, l. c. 353, 46 L. Ed. 936, l. c. 944, in these words:

> "If it were otherwise, then any alleged error in the decision by a state court, in applying state law to the case in hand, resulting in a judgment against a party, could be reviewed in this court on a claim that on account of such error due process of law had not been given him This cannot be maintained."

In *Hallinger* v. *Davis*, 146 U. S. 314, l. c. 320, 36 L. Ed. 986, 13 S. Ct. 105, this court said:

> "This requirement of the Constitution is met if the trial is had according to the settled course of judicial proceedings. Due process of law is process due according to the law of the land. This process in the states is regulated by the law of the state."

In *L. & N. Ry. Co.* v. *Woodson*, 134 U. S. 614, 33 L. Ed. 1032, the contention was made that a Tennessee statute forbidding the granting of more than two new trials in the same

cause on the same facts was in conflict with Amendment XIV to the Constitution of the United States. This court held:

> "Courts rarely grant a new trial after two verdicts upon the facts of favor of the same party, except for error of law, and the Statute, in the interest of the termination of litigation, makes that imperative which would otherwise be discretionary. (Citing cases.)
>
> "We can perceive nothing in the Statute thus applied which amounts to an arbitrary deprivation of the rights of the citizen, and concur with the Supreme Court of Tennessee that this Act, which had been in force for more than sixty years before the adoption of the Fourteenth Amendment, was not invalidated by it, while the Fifth Amendment had no application whatever."

II

There is no provision of the Constitution or Statutes of the United States which gives the Appellants the right to maintain jointly in the courts of Missouri, the instant suit for their alleged cause or causes of action and no rights under the Constitution or laws of the United States were denied to Appellants by the holding of the court that there was a misjoinder of parties plaintiff. (Appellants' Assignment of Errors numbers 20, 33 and 34)

The premise underlying the last mentioned Assignments of Error is that appellants had some right both created and protected by Federal law, to bring and maintain jointly, the instant action. They have entirely failed to demonstrate any such right.

All that the Supreme Court of Missouri has decided, in the instant case, is that under the applicable law appellants had no right to maintain *jointly* the instant suit. The trial court sustained the demurrers on the one ground of misjoinder of parties plaintiff (R. 401, 421-423). The Mis-

BLEED THROUGH– POOR COPY

souri Supreme Court in its opinion (193 S. W. 2 588, l. c. 591, 592) held that:

> "Judge Ridge sustained the demurrers on the sole ground of misjoinder of parties, but the demurrers also attacked the petition for misjoinder of alleged causes of action and for failure to state a cause of action. We think the reason assigned by the trial court is sufficient, but his ruling can be sustained on the other grounds mentioned. • • •
>
> "None of these assignments is germane to the question of whether the Fifth Amended Petition contains a *misjoinder of parties plaintiff* or fails to state a *joint* cause of action. (Emphasis added.)

The ground of failure to state a cause of action as sustained by the opinion quoted, thus relates solely to the failure to state a cause of action in favor of plaintiffs jointly. *Fadler* v. *Gabbert*, 333 Mo. 851, l. c. 863, 63 S. W. 2d 121, l. c. 127; *Akins* v. *Hicks*, 109 Mo. App. 95, l. c. 99, 83 S. W. 75, l. c. 76. Counsel for appellants explicitly requested the court to determine whether or not the petition states a cause of action as to *either* plaintiff. This the trial court did not do (R. 401, 422). Consequently, there was no decision against the validity of Sections 1979, 1980 and 1981, U. S. R. S. (Secs. 43, 47 and 48, Title 8 U. S. C.) or against the right of either appellant to maintain an action thereunder. The decision was that they had no right under the applicable Missouri law of procedure to join in such an action.

Appellants rely, in their argument as to the right of joinder, which is all that is pertinent here, on cases such as *Wells* v. *Davis*, 303 Mo. 388, a suit by an administratrix alone, under the Federal Employees' Liability Act and various cases in which it is claimed that defendant parties have been held by Federal decisions to be entitled to join in actions grounded upon the Federal Civil Rights Acts.

Wells v. *Davis, supra,* is specifically not in point on the question of alleged right of joinder since it was prosecuted by the administratrix alone. It does, however, give point to a distinction which is fatal to the theory of appellants. *Wells* v. *Davis* points out clearly that the Federal Employees' Labor Act vests the right of action granted, *in the personal representative* as a part of the law itself. The act vests the appointed representative with all the rights given thereunder (303 Mo. l. c. 404). The Federal Civil Rights Acts relied on do not specifically vest any person in a representative character with the rights of action created or make any right of joinder a part of the cause of action. R. S. Section 1979, Title 8 U. S. C. Sec. 43, gives the liability to "the party injured." Section 1980 R. S. Title 8, Sec. 47 *id.*, specifies "the party so injured or deprived." Section 1981 R. S. Title 8 Sec. 48 *id.*, awards the recovery "to the party injured or his legal representative"; but none of the three sections creates any right of joinder, or attempts to abrogate in any respect the civil procedure of the State in whose courts an action under Federal sections may be brought.

Appellants choose the state forum. As an incident they were entitled to any advantages, and burdened by any disadvantages, as to the law of procedure, which that choice involved. *Mo. ex rel* v. *Taylor,* 266 U. S. 200, 69 L. Ed. 247, 45 S. Ct. 47, 42 A. L. R. 1232, l. c. 1235; *Minneapolis & St. Louis R. Co.* v. *Bombolis,* 241 U. S. 211, 221, 60 L. Ed. 961, 965, 36 S. Ct. 595, Ann. Cas. 1916 E 505, 506; *Niehaus* v. *Jos. Greenspon's Son Pipe Corp.,* 237 Mo. App. 112, 164 S. W. 2 180, l. c. 186; *Rockwood* v. *Crown Laundry Co.,* 352 Mo. 561, l. c. 564, 565, 178 S. W. 2 440, l. c. 442, 443.

No right of joinder being conferred upon appellants by the Federal statutes on which they rely, they are subject to the applicable rules of local practice, though claiming a

BLEED THROUGH— POOR COPY

right of action under Federal statutes. In the *Bombolis* case, *supra*, this court made a basic application of that principle, by holding that local courts are entitled to act under a local practice permitting less than a unanimous verdict, in actions to enforce rights under Federal statute like the Employees' Liability Act, notwithstanding the requirement of the Seventh Amendment to the United States Constitution that trials by jury be according to the course of common law, *i. e.*, by unanimous verdict. On questions of joinder, the Missouri appellate courts have rightfully acted upon that principle in cases arising under the Fair Labor Standards Act of 1938, Title 29, U. S. C. Secs. 201-219. *Niehaus* v. *Jos. Greenspon's Son Pipe Corp., supra, Rockwood* v. *Crown Laundry Co., supra.* Except in matters governed by the Federal Constitution or by Acts of Congress, the law of the state is to be applied, whether it be declared by local statute or by the decision of its highest court. *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, 82 L. Ed. 1188.

Under the applicable law of Missouri, the appellants could not join in bringing or prosecuting the instant action. In the *Niehaus* case, *supra,* the plaintiffs, as husband and wife, joined in the action, each asserting his or her own individual right of recovery for unpaid minimum wages, overtime, damages and attorneys fees, under the Fair Labor Standards Act. The St. Louis Court of Appeals, commented that under local laws and practice, such two causes of action, neither of which affected both plaintiffs nor arose out of the same transaction, could not be commingled as though a single cause of action were involved, nor even stated as separate counts in one petition. It further held that the case did not purport to be a class suit, and had it been such, could not have been maintained at law. The Supreme Court of Missouri approved the ruling in the

Niehaus case by citing it as a precedent in *Rockwood* v. *Crown Laundry Co., supra.* The plaintiffs, husband and wife, in *Picking* v. *Pa. R. Co.*, 151 F. (2d) 240, upon which appellants rely, could not have maintained their suit in a Missouri State court under the foregoing applicable Missouri authorities. Their petition, like that in the instant suit, was so voluminous, illogical and obscure that it was indicated the pleadings should be so amended as to shape the issues, but under the law, rightly applied in this case it would be impossible, so to amend the complaint as to state a valid cause of action, in a Missouri State Court.

The Fair Labor Standards Act in Title 29 U. S. C., Sec. 216 provides that the action thereunder may be maintained in any court of competent jurisdiction by one or more employees for and in behalf of himself, or themselves and other employees similarly situated and yet the Supreme Court of Missouri in applying the law of joinder of plaintiffs applicable in this case, held that the local procedure governed. In *Rockwood* v. *Crown Laundry Co.*, 352 Mo. 561, 178 S. W. 2d 440, it was held:

> "the personal action of plaintiff may not be united with those brought by her in a representative capacity,"

although the action was brought under the Federal Fair Labor Standards Act containing the provision thereof last mentioned. Since the Civil Rights Acts contain no provision authorizing joinder, as pointed out above, the reasoning in the *Crown Laundry* case *supra,* that plaintiff individually is not interested in nor a necessary party to the cause of action asserted in her representative capacity for and on behalf of her fellow employees similarly situated and vice versa, is controlling here. In *Reppetto* v. *Walton*, 313 Mo. 182, 281 S. W. 411, 415, 416, the Supreme Court of Missouri held that the executrix could not join with herself

BLEED THROUGH– POOR COPY

in her individual capacity as a plaintiff to recover from the defendant, moneys alleged to be due the plaintiff from the estate of the deceased of which one of the plaintiffs was executrix. That decision reaches the present case. Appellants cite *Georgia* v. *Pa. R. Co.*, 324 U. S. 439, 89 L. ed. 1051. In the opinion therein this court said of the capacities in which plaintiff sued, that:

> "Georgia sues in four capacities only two of which we need mention: (1) in her capacity as a quasi-sovereign or as agent and protector of her people against a continuing wrong done to them; and (2) in her capacity as a proprietor to redress wrongs suffered by the State as the owner of a railroad and as the owner and operator of various institutions of the State."

It is manifest there is nothing in this case which by any stretch of the imagination could be held to authorize the joinder by an individual, of herself as an executrix in the same action. The cited case invoked the original jurisdiction of this court. In addition to its capacity as a sovereign state, plaintiff sued as a quasi-sovereign or protector of her people against a public wrong. This decision could have no proper application to a case brought in the State Court under the Federal Civil Rights Act, which vests no specific person or entity with a right of action as a part of the terms of the statute and contains no joinder provisions.

Appellants apparently cite *Bell* v. *Hood*, 90 L. ed. 758, 66 Sup. Ct. 773, as going to the validity of a cause of action alleged under the Civil Rights Act. In that case the action had been brought in a district court of the United States and the question passed upon was as to the sufficiency of the allegations of the complaint to invoke the Federal jurisdiction, and this court, through Mr. Justice Black, pointed out not only that the issue as to the sufficiency of the pleaded facts to authorize a recovery was not material

to the determination of the jurisdictional question, but also that the issue of law as to whether a money recovery for damages could be had in the action under the Federal law relied upon, had never been determined by this court. No question as to the number of plaintiffs, or their respective capacities, or their right to join as plaintiffs in the action, was passed upon either directly or indirectly in *Bell* v. *Hood*, supra.

Many of the contentions made by appellants herein in their Jurisdictional Statement are entirely pointless and irrelevant because they proceed upon the insupportable theory that the Supreme Court of Missouri in its opinion 193 SW 2 588 l.c. 592) passed upon all of the allegations of the Fifth Amended Petition to hold that same stated no cause of action at all, (as distinguished from failure to state a *joint* cause of action), and affirmed a judgment which had the legal effect of barring any further action on the alleged facts. That court (l.c. 592) referred by citations, to the cases in which the principal substantive contentions of the appellants had already been litigated, and raised in their respective Assignments of Error in applying to this court for certiorari, which this court denied as long ago as October 9, 1933, 290 U. S. 642, 78 L. ed. 558 (leave to petition for rehearing denied December 11, 1933, 290 U. S. 602, 78 L. ed. 528) and May 18, 1936, 298 U. S. 675, 80 L. ed. 1397, respectively. We have qouted from the opinion of the Supreme Court of Missouri at the beginning of this point showing that its decision went solely to the right of appellants to maintain jointly the instant action and we have shown that the effect of the affirmed judgment of dismissal of the pending petition was not that of a judgment on the merits, and did not preclude bringing or maintenance of another action on the facts alleged, by our separate point to that effect.

BLEED THROUGH— POOR COPY

Appellants complain in their motion for rehearing in the Supreme Court of Missouri, that it had overlooked *Fadler* v. *Gabbert*, 333 Mo. 851, 63 SW 2 121, and *Scott* v. *Alton Bank & Trust Company*, (Mo.) 175 S W 920, in ruling on the question of misjoinder of plaintiffs, or failed to apply same as controlling decisions of the court. In the opinion however, (193 SW 2 588) the court construed the opinion in the Fadler case as holding that misjoinder of parties, though not listed as a specific ground of demurrer in the Missouri statute, was in fact such a ground because where there is a misjoinder "the petition does not state a cause of action." In *Scott* v. *Alton Bank & Trust Company*, supra, the grounds of (1) defect of parties plaintiff and (2) failure to state facts sufficient to constitute a cause of action, were interposed by demurrer against each count of the petition and the court ruled that "the defendants' demurrer to petition was properly sustained, as no joint right of action appears from the petition." (l.c. 925.) This but clarifies the ruling in the instant case and expresses the reason why no cause of action is stated, i.e., no cause of action was pleaded in favor of the plaintiffs jointly, as neither had any right or interest in the cause of action of the other. This is well expressed in *Neiderburg* v. *Golluber*, (Mo.) 162 SW 2 592, wherein the Missouri Supreme Court says of the identical situation in the instant case, one attempting to join individually with himself as administrator of the estate of his deceased spouse, that:

> "Accordingly, plaintiff as administrator would be entitled to the rent from the real estate prior to Effie V. Niederberg's death (Sec. 94, supra), but would have no interest in the rent or income derived from such real estate after her death. On the other hand, plaintiff, as the widower, would have no right to recover or join in the recovery of the rent or income derived from the property by defendants prior to the

death of Effie V. Niederberg. The widower and heirs would be entitled to all income and rental value after her death, unless required for purposes of administration, (citing statutes). The plaintiffs, therefore, are not 'united in interest' in their claim for rental value of this alleged trust real estate, (citing statutes). Nor are they both necessary parties to a 'complete determination or settlement of the question involved.' Sec. 852 R. S. 1939 Mo., R. S. A. No. 852. Nor are both plaintiffs (legally) interested in the subject matter, and in obtaining the relief demanded so as to be properly joined as plaintiffs under Sec. 851, R. S. 1939 Mo."

The applicable Missouri law was that the appellants herein could not join in the same action. But if the trial court and the Supreme Court of Missouri had erred in holding to the contrary, it was purely a question of state practice upon which their decisions were final. *U. S.* v. *Pink*, 315 U. S. 203, 86 L. ed. 796, 62 S. Ct. 552, where, in reply to a suggestion that this court on certiorari to the Supreme Court of New York inquire into a question of local procedure, this court said:

> "That is distinctly a question of state law on which New York has the last word."

III

Appellants' claim that the demurrers to the Fifth Amended Petition were sustained without notice or hearing is not sustained by the record.

(Appellants' Assignment of Error No. 16. Appellants' Jurisdictional Statement, pp. 3 and 19.)

The record shows these demurrers to Plaintiffs' Fifth Amended Petition were on file prior to the 6th of December, 1944 (Record 389-391, 393). On December 8th, 1944, Appellants being represented in court by Mr. O'Donnell,

BLEED THROUGH— POOR COPY

Appellee Weede applied to the court for permission to amend her separate demurrer and the court permitted the same to be filed (Record 393). The court set the hearing on the Commerce Trust Company separate demurrer and the Weede demurrer for hearing on Wednesday, the 13th day of December, 1944 (Record 389-391,393). On December 13, 1944, the court met with all parties represented. On that day the court disposed of motions of Kopp, Weede, and Howard to strike out Plaintiffs' replies (Record 416-419). No ruling was made on the demurrers on that date.

The record is silent as to any hearings on the demurrers until the order sustaining them on December 30, 1944. This is without significance, as it is not customary to record in the records arguments of counsel on days where the court made no ruling to be recorded in the court records. That such hearings were held is clearly shown by the record in this case. The bill of exceptions prepared by Appellants shows (Record 419) that "the cause came on regularly for hearing" on December 30, 1944, that the Appellants were represented thereat by Mr. Martin J. O'Donnell (Record 420). By leave of court Mr. O'Donnell amended Plaintiffs' Fifth Amended Petition by striking therefrom Paragraph 45 (Record 420-422, 423). Defendants, by leave of court, thereupon refiled their demurrers to said Fifth Amended Petition as then amended (Record 420-423). At that juncture the record shows the following occurred (Record 420-421):

> "Mr. O'Donnell: I want to make a short record to aid the Court. If the Court please, in the performance of our duty to the plaintiff, we feel that it is our duty to call attention to the fact that now that the petition has been amended by eliminating a part of the grounds of their objection, and since the Court hasn't had any argument, hasn't made up its mind as to whether or not the petition states a cause of action as to either party,

then we respectfully suggest that the matter be held until the Court has a chance to look into the whole proposition, and make up its mind as to whether or not the petition states a cause of action. Also, since the petition has been just amended and they have just filed their demurrers, under the rules of the Court I believe we have a right to—I don't want to be taking any technical advantage, but I think it is my duty to the plaintiff to suggest that we are entitled to two days' notice, because there is a new question in the case, it is a new petition.

"The Court: I do not intend to make any such ruling as that. It does seem rather futile to me to have made up my mind on this one point, which was so apparent to me in this case from the pleadings, when I asked for the briefs, to have additional number of days' arguments and submission of briefs here. I understand counsel for Defendants are willing to rely upon this one ground that is stated in their demurrer.

"Judge Goodrich: We think that ground is well taken.

"The Court: I am going to make an order sustaining the demurrer on that one ground.

"Mr. O'Donnell: In view of the fact that the Court has indicated his notion without announcing the ruling——

"The Court: I have announced my ruling already, that I am sustaining the demurrers on the grounds of misjoinder of parties plaintiff.

"(To which ruling and action of the Court the Plaintiffs, by their counsel, at the time duly excepted and still except.)"

The language of the court shows there had been briefs and arguments directed, at least, to the issue of misjoinder of parties plaintiff. That such is the case will not be denied by Appellants' counsel. The court had made up his mind on that issue and had already indicated his views. We submit the language of Mr. O'Donnell shows he was seeking further hearing on the propositions of whether the

BLEED THROUGH- POOR COPY

tion stated a cause of action as to either party and as to ther the petition stated a cause of action (R. 420). re was no request for further arguments on the issue of joinder of parties plaintiff. The amendment to Plain-' Fifth Amended Petition just effected by striking out agraph 45 was immaterial to the issue of misjoinder arties plaintiff. That this is so is shown by the opinion he Supreme Court of Missouri, *Moffett* v. *Commerce st Co.*, 193 S. W. 2d 588, where the Court said: (l. c. 591)

"The demurrers to the fifth amended petition were filed on or before December 6, 1944. Then appellants filed a reply on the theory that the demurrers were really answers, which reply was after a hearing stricken out on respondents' motions. Then on December 30, 1944, with all parties present by counsel, the demurrers were presented to Judge Ridge. Appellants, by leave of court, withdrew paragraph 45 of their fifth amended petition, and respondents refiled their demurrers. Appellants requested at least two days' delay on the ground that the demurrers had just been filed. The court, in the exercise of proper discretion, denied this request. Kuh v. Garvin, 125 Mo. 547, 28 S. W. 847, loc. cit. 851. The withdrawal of paragraph 45, which related to a suit brought by respondent Kopp against Mrs. Moffett, in no way affected the point made in the demurrers as to misjoinder of parties plaintiff or failure to state a cause of action. We see no violation of the rules."

he self-serving statements of counsel inserted in the ord at Page 406 and quoted by Appellants on Page 19 their Jurisdictional Statement to the effect that these urrers were sustained "without notice thereof for hear- or jurisdiction so to do" are disproved by the record lf.

t is therefore apparent that Appellants' counsel were en full opportunity to brief and argue the issue of mis-

joinder of parties plaintiff, the only issue ruled by the Court, and that they took full advantage of that opportunity. They were satisfied to the extent that they requested no further hearing on that issue.

To demonstrate that the trial court took the same view as to the ruling he made which was later approved by the Missouri Supreme Court, we quote the following from the record (Record 422):

> "Mr. O'Donnell: We respectfully request the Court to determine the fact whether or not the petition states a cause of action as to either plaintiff.
>
> "The Court: If the defendants are not insisting on those other grounds, I will just overrule the other grounds of the demurrer.
>
> "Mr. Harding: If Your Honor please——
>
> "Judge Goodrich: I think on that the law is that sustaining a demurrer on the ground of misjoinder of parties plaintiff has the effect of saying that there is no joint cause of action. That is the law.
>
> "The Court: That is the law. There is no question about it."

IV

Appellants' contention that the Missouri Supreme Court erred in not deciding the case on appeal under the new code of civil procedure although the case was tried below under the old code before the effective date of the new code is without merit and raises no Federal question. (Appellants' Assignment of Errors No. 22, Appellants' Jurisdictional Statement, pp. 38-39.)

Appellants next contend that as the new Missouri Code of Civil Procedure had become operative prior to the time this case was decided by the Supreme Court of Missouri on appeal that court was bound to apply the new Civil

BLEED THROUGH– POOR COPY

Code and reverse the cause even though the case was properly tried under the Code in force at the time the Circuit Court sustained the demurrers.

In the first place, this particular point was not raised in Appellants' briefs or in their motion for rehearing or to transfer to the court *in banc* filed in the Missouri Supreme Court. Even in their motion for a rehearing or to transfer to the court *in banc* they complain only of errors originating in the trial court and make no reference to any claimed error originating in the Missouri Supreme Court. That contention was never called to the attention of the Missouri Supreme Court in any manner and that court was never given an opportunity to pass on this question. For that reason alone, such question, now belatedly sought to be raised, is not before this court. The rule is stated by this court in *Hunter Company* v. *McHugh*, 320 U. S. 222, 227, 64 S. Ct. 19, 21, as follows:

> "• • •, this Court, is reviewing on appeal the judgment of the State Supreme Court is not free to, and will not adjudicate the constitutionality of orders No. 28-C and No. 28-C-10 where the state court whose judgment is under review has had no opportunity to pass upon their validity under state law or the Constitution of the United States. See McGoldrick v. Compagnie Generale, 309 U. S. 430, 433 et seq., 60 S. Ct. 670, 672, 84 L. Ed. 849."

The reason for the requirement that this Court will not ordinarily consider a question not passed on by the State Court was well stated by this Court in the case of *Huddleston* v. *Dwyer*, 322 U. S. 232, 237, 64 S. Ct. Rep. 1015, as follows: (l. c. 1018)

> "We have often had occasion to point out the importance to the orderly judicial administration of state laws in the federal courts that questions of state law

required to be decided here should first be considered and decided by the state or federal court from which the case is brought to this Court for review. Dorchy v. Kansas, 264 U. S. 286, 290, 291, 44 S. Ct. 323, 324, 325, 68 L. Ed. 686; State of Missouri ex rel. Wabash R. Co. v. Public Service Com. 273 U. S. 126, 131, 47 S. Ct. 311, 313, 71 L. Ed. 575; Ruhlin v. New York Life Ins. Co., 304 U. S. 202, 206, 207, 58 S. Ct. 860, 861, 82 L. Ed. 1290; New York ex rel. Whitman v. Wilson, 318 U. S. 688, 690, 691, 63 S. Ct. 840, 841, 87 L. Ed. 1083. The decision of the highest court of a state on matters of state law are in general conclusive upon us, and ordinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts, cf. Ruhlin v. New York Life Ins. Co., supra. When we are called upon to decide them, the expression of the views of the judges of those courts, who are familiar with the intricacies and trends of local law and practice, if not indispensable, is at least a highly desirable and important aid to our determination of state law questions. This Court will not ordinarily decide them without that aid where they may conveniently first be decided by the court whose judgment we are called upon to review. See, e.g., Ruhlin v. New York Life Ins. Co., supra; Rosenthal v. New York Life Ins. Co., 304 U. S. 263, 264, 58 S. Ct. 874, 875, 82 L. Ed. 1330; West v. A. T. & T. Co., 311 U. S. 223, 241, 61 S. Ct. 179, 185, 85 L. Ed. 139, 132 A. L. R. 956; Klaxon Co. v. Stentor Electric Mfg. Co., 313 U. S. 487, 497, 61 S. Ct. 1020, 1022, 85 L. Ed. 1477; Meredith v. Winter Haven, supra."

The question here involved is one of construction of the Missouri Statutes establishing a new code of civil procedure. With reference to its applicability to proceedings had under the old code prior to the effective date of the new, we believe this is a State matter involving no federal ques-

BLEED THROUGH– POOR COPY

tion. In the case of *Midland Realty Company* v. *Kansas City Power & Light Company*, 300 U. S. 109, 110, 113, 57 S. Ct. Rep. 345 and 346, the court said:

> "The questions for decision are whether, as construed in this case by the highest court of Missouri, the statutes of that State regulating public utilities violate article 1, section 10 of the Constitution of the United States, declaring that 'No State shall • • • pass any • • • Law impairing the Obligation of Contracts,' or section 1 of the Fourteenth Amendment declaring 'nor shall any State deprive any person of life, liberty or property, without due process of law.'
>
> "These questions are to be decided upon the construction that the state supreme court put upon the statute."

Section Three of the new Missouri Code here involved, Laws of Missouri 1943, page 357, Mo. Rev. St. Ann., Section 847.3, is as follows:

> "This code will take effect on January 1, 1945. It governs all proceedings in actions brought after it takes effect and also further proceedings in all actions then pending, except to the extent that in the opinion of the court its application in a particular action pending when this code takes effect would not be feasible or would work injustice, in which event the former procedure applies."

The Missouri Supreme Court in the present case in ruling against Appellants' then contention that this statute had potential existence prior to its effective date held that it affected only proceedings after the effective date of January 1, 1945, which was subsequent to the entry of the judgment of the trial court. The express language of the statute quoted above would seem to permit of no other construction.

On this point the Missouri Supreme Court said in this case (*Moffett* v. *Commerce Trust Company*, 193 S. W. (2d) 588, 589-590:

> " (1) Appellants are in error in construing the new Civil Code, Mo. Laws, 1943, pp. 353-397, Mo. R. S. A. Sec. 847.1 et seq., as declaring what the law was at the date of its passage. They reach this result by emphasizing the word 'is' in the sentence 'misjoinder of parties *is* not a ground of demurrer to an action,' but they overlook further provisions of the Code, Sec. 3, to wit: 'This code will take effect on *January 1, 1945*. It governs all proceedings in actions brought *after* it takes effect and also *further* proceedings in all actions then pending, except * * *.' (Emphasis ours.) Section 922, although now repealed, was in force on December 30, 1944, the date Judge Ridge ruled on the demurrers."
>
> (Italics by the court.)

But even if this question had been presented to the Missouri Supreme Court and actually ruled upon by it, the result would necessarily have been the same. It is the well-established Missouri rule that procedural statutes operate prospectively only after their effective date as to future proceedings in actions pending on the effective date of such statute. The Missouri rule is so well stated in the leading case of *Lober* v. *Kansas City*, 339 Mo. 1087, 74 S. W. (2d) 815, that we quote liberally therefrom as follows: (l. c. 826)

> " (15) It should be observed, however, that even in matters of procedure a change in the law by new statute or authoritative court decision does not act prospectively or in the future only in the sense that the change does not apply to cases already pending. Such change does usually apply to cases then pending as to future proceedings therein, but does not make void or invalid the proceedings already had if same were in conformity to the law as it was before the

BLEED THROUGH— POOR COPY

change. Clark v. Railroad, 219 Mo. 524, 533, 118 S. W. 40, wherein the court quoted the correct rule in this respect from 2 Lewis' Sutherland, Statutory Construction (2d Ed.) Sec. 674, to-wit: 'No person can claim a vested right in any particular mode of procedure for the enforcement or defense of his rights. Where a new statute deals with procedure only, prima facie it applies to all actions—those which have accrued or are pending, and future actions. What was before a subject of equitable relief may be made triable by jury without affecting vested rights. If before final decision a new law as to procedure is enacted and goes into effect, it must from that time govern and regulate the proceedings. But the steps already taken, the status of the case as to the court in which it was commenced, the pleadings put in, and all things done under the late law, will stand, unless an intention to the contrary is plainly manifested; and pending cases are only affected by general words as to future proceedings from the point reached when the new law intervened. If what has been done under the old law is bad or insufficient (or vice versa) under that law it remains so.' And so this court correctly ruled in State ex rel. v. Haid, 330 Mo. 1093, 52 S. W. (2d) 183, 186, that: 'It is a well-settled rule that, if before final decision in a case a new statute as to procedure goes into effect, it must from that time govern and regulate the proceedings. * * * And a like result is produced by a change in the construction of a statute relating to procedure by a court of last resort.' This is the extent to which this court has gone and no further."

This judgment had been entered and an appeal taken by appellants on the same day of the judgment, (to preserve their rights on appeal under the old Code which gave them greater latitude as to length of briefs and other advantages), all prior to the effective date of the new Code on January 1, 1945. There was thereafter no proceedings had in the Circuit Court and under the established rule in

Missouri the changes wrought by the new Code did not invalidate the proceedings theretofore taken in the Circuit Court which were valid under the old Code then in force.

In the case of *Anson* v. *Tietze*, 190 S. W. (2d) 193 (not yet officially reported), the Missouri Supreme Court said: l. c. 198)

> "It is well settled that when a new statute as to procedure goes into effect before the final decision of a case it governs and regulates matters of procedure therein subsequent to its effective date. Clark *v.* Kansas City, St. L. & C. R. Co., *v.* Haid (Banc), 330 Mo. 1093, 1100 (II), 52 S. W. (2d) 183, 186 (3-5)."

That is the last expression of the Missouri Supreme Court we have found and confirms its adherence to the rule that a change in procedure affects only "matters of procedure therein subsequent to its effective date."

In the case of *Crawford* v. *Arends*, 351 Mo. 1100, 176 S. W. (2d) 1, the Court, *in banc*, held an adopted child, claiming as a lineal descendant under a will, not entitled to recover. In a motion to modify or clarify the opinion, it was called to the attention of the Court that five days before the opinion of the Court was delivered a new statute had been enacted which, it was claimed would allow the claimant to recover. The Court wrote a per curiam opinion overruling said Motion to Modify or Clarify Opinion in the course of which the Court said: (l. c. 7)

> "It will be noticed the section says the adopted person 'shall hereafter be deemed and held,' etc. The word 'hereafter' as thus used refers to the date when the Act takes effect. 19 Words and Phrases Perm. Ed., page 389. It is obvious that the construction of this statute and the respondent's rights under it were not and could not have been a matter for adjudication in the trial court; and since this record is here by appeal we are confined to the issues in that court.

BLEED THROUGH– POOR COPY

We cannot treat the cause as an original proceeding and determine the meaning and effect of the statute."

In the case of *Simpson* v. *Stoddard*, 173 Mo. 421, cited by Appellants on this point is clearly distinguishable for the statute there involved was a curative statute expressly enacted for the purpose of operating retrospectively. Exactly the opposite is true here as the statute itself limits its application to matters arising prospectively.

Furthermore, Section 3 of the Missouri Code for Civil Procedure quoted *supra* as to proceedings subsequent to its effective date authorizes the trial court, in its discretion, to follow the old procedure in any case pending prior to the effective date of the new Code whenever, in the opinion of such court, it "would not be feasible or would work injustice." Therefore, even if the case were reversed and remanded, the trial court still would be authorized to apply the old procedure in the exercise of this discretion.

Furthermore, Appellants have not shown they were prejudiced by the application of the old Code with respect to the joinder of parties and causes of action. In fact the contrary appears from the opinion of the Supreme Court, *Moffett* v. *Commerce Trust Company*, 193 S. W. (2d) 588, wherein the Court says: (l. c. 591)

> "Judge Ridge sustained the demurrers on the sole ground of misjoinder of parties, but the demurrers also attacked the petition for misjoinder of alleged causes of action and for failure to state a cause of action. We think the reason assigned by the trial court is sufficient, but his ruling can be sustained on the other grounds mentioned. Hartvedt *v.* Harpst, Mo. Sup. 173 S. W. 2d 65, loc. cit. 68; Bushman *v.* Barlow, 321 Mo. 1052, 15 S. W. 2d 329, 330."

Said Section 3 of the Missouri Code for Civil Procedure was modeled on Rule 86 of the Federal Rules for Civil

Procedure. In the aspect now being considered we are confident the two call for the same construction.

In the case of *Doyle* v. *Loring*, 107 F. (2d) 337, the District Court dismissed the bill for lack of jurisdiction over the subject matter and for lack of proper venue. In affirming that ruling the United States Circuit Court of Appeals for the 6th Circuit said: (l. c. 340)

> "Appellants insist that the application of Rules 17(b), 4(d) (1), 4(d) (7), 12 (h), 28 U. S. C. A. following Section 723c, requires a result different from that reached by the District Court. We are not required to enter into a detailed discussion of the rules. The Rules of Civil Procedure became effective while the suit was pending and whether they should have been applied was in the discretion of the Court (Rule 86)."

Application for certiorari to this Court in that case was denied, 309 U. S. 686, 60 S. Ct. Rep. 808.

Application of the previous Rules of Procedure, under similar conditions, have been approved by the Federal Courts in construing the Federal Rules of Civil Procedure which are the parent of Section 3 of the new Missouri Code.

In the case of *City of El Paso* v. *West*, 104 F. (2d) 96, the United States Circuit Court of Appeals for the Fifth Circuit in a memorandum opinion on Motion for Rehearing said: (l. c. 97)

> "Appeal is also made to the new rules of Civil Procedure which abolished the old forms of action and provide that there shall be but one.
>
> "This case was filed and tried in the District Court before the Rules of Civil Procedure existed. The pleadings must be interpreted according to the laws then obtaining."

In that case an application for certiorari to this Court was denied, 308 U. S. 587, 50 S. Ct. 111.

BLEED THROUGH– POOR COPY

In the case of *Frigorifico Wilson De La Argentina* v. *Weirton Steel Company*, 31 Fed. Supp. 218, the United States District Court for the Northern District of West Virginia sustained a demurrer to the 5th declaration, saying: (l. c. 219)

> "This declaration has been tested by the common law rules of pleading, as applied in the Courts of West Virginia under the General Conformity Act, 28 U. S. C. A., Section 724, because said declaration was filed prior to the adoption of the Federal Rules of Civil Procedure, 28 U. S. C. A., following Section 723c. See Rule 86. Of course all future pleadings herein, filed by either party, must conform to the new rules."

Upon appeal, that decision was affirmed by the United States Circuit Court of Appeals for the Fourth Circuit, but without discussing the particular point, 62 F. (2d) 677.

Under both the Missouri and Federal authorities, the Missouri Supreme Court committed no error in deciding this case on appeal on the basis of the governing authority being the old procedure under which the case was tried in the court below. The point is not before this Court, but, if it were, we submit there is no merit in Appellants' contentions and no substantial Federal question is presented which could give this Court jurisdiction.

V

There was no error by Division 1 of the Supreme Court of Missouri in denying the application of appellants for transfer of the instant cause to the Supreme Court of Missouri en banc; appellants could not claim such transfer as a matter of right; and there was no violation of the equal protection clause of Sect. 1 of Amendment XIV to the United States Constitution.

The Supreme Court of Missouri *en banc* does not have superintending control over a division of that court (Appellants' assignment of error number 37). Appellants, in their Jurisdictional Statement, say that "Said division I of the Missouri Supreme Court is not the highest court in Missouri. Appellants sought by said motion to transfer the case to the Court En Banc, which is the highest State Court." (Citing cases.)

In one sense, there is a legal procedure under which, in certain instances, a cause may be transferred to the Missouri Supreme Court *en banc* from a division thereof, but under the law and the facts in this case and for the purposes of this appeal, Division 1 of the Missouri Supreme Court was the highest court of the State in which a decision of this case could be had by the appellants. Under the law the decision of Division 1 of that court against transfer of a cause to the court *en banc* was as conclusive upon the appellants as it was upon the court, as distinguished from the two divisions in which the Judges thereof sit. The court *en banc* cannot, on application to it, by the losing party, review a decision of a division that no Federal question is involved in the case, and refusing to transfer the case to the court. *Scheufler* v. *Mfg. Lumb. Underwriters*, 349 Mo. 855, 163 S. W. 2, 749, 750; certiorari denied 317 U. S. 684, 87

BLEED THROUGH– POOR COPY

L. Ed. 548. *State* v. *Duestrow*, 137 Mo. 44, 91, 38 S. W. 544, 39 S. W. 266, l. c. 267, 268.

In *State* v. *Duestrow, supra*, the Supreme Court of Missouri, *en banc*, aptly stated the issue of law (39 S. W. l. c. 267) thus:

> "The only question directly presented for our consideration on this motion is whether the court, sitting in banc, has power, under the amendment to the constitution adopted in 1890, to review the action of a division of the court, and determine whether a federal question is involved, and to order a transfer of a case to court in banc after such division has unanimously decided that there is no federal question in the case."

The Court, after referring to the constitutional provisions involved, in Section 4 of the 1890 Amendment to the Missouri State Constitution reading as follows:

> "When the judges of a division are equally divided in opinion in a cause, or where a judge of a division dissents from the opinion therein, or where a federal question is involved, the cause, on the application of the losing party, shall be transferred to the court for its decision; or, where a division in which a cause is pending shall so order, the cause shall be transferred to the court for its decision.",

proceeds with its opinion thus:

> "Does this section give to the court in banc the power claimed by defendant under his motion? We are of the opinion that it does not. It cannot be said that this section gives to the supreme court superintending control over a division." * * *
>
> "The existence or nonexistence of a federal question in a cause may sometimes be in doubt, and judges may differ in their opinion on the question; yet a division of the court is fully as competent to determine that question as the more important one involving the merits of the case, in which the power is not, and, indeed, cannot

> be, disputed. Its unanimous judgment on incidental questions is also conclusive. In this case division 2 heard the appeal on its merits. The application to transfer was properly made to it. The right to a transfer depended upon whether a federal question was involved. That was a question for that division to settle. It did so, by finding that no federal question was involved, or, as the application was denied, we must presume it so found. The court sitting in banc is given no power to review that decision. Defendant's motion is overruled."

In *Scheufler* v. *Mfg. Lumb. Underwriters, supra*, the Supreme Court of Missouri *en banc*, in holding that the constitutional amendment of 1890 does not give the Supreme Court *en banc* superintending control of a division of the court and that the court *en banc* cannot compel the transfer of a cause to the court *en banc* from a division thereof, says:

> "Ever since the decision of State *v.* Duestrow, 137 Mo. 44, 91, 38 SW 554, 39 SW 266 in 1896, it has been the settled law of this state that such motions must be filed in whichever of the two Divisions of this court has decided the case; *and that the court en banc cannot compel a transfer of the cause.* • • •
>
> "The Duestrow case, (137 Mo. loc. cit. 95, 38 S.W. 554, 39 SW. loc. cit. 268) squarely holds that *Sec. 4 of the Amendment does not give the court en banc superintending control over a Division.*
>
> "The Amendment of 1890 was adopted to expedite the work of the court by creating two divisions of concurrent jurisdiction, each with the separate power to adjudicate causes coming to the court; and with the further power to determine when causes before it, shall be transferred to the court en banc under Sec. 4 of the Amendment." (Emphasis added.)

As noted above, this Court denied certiorari in the last cited case.

Since the above decisions the State of Missouri in 1945 adopted a new Constitution but we submit the comparisons here made will show that the slight changes in phraseology in the new Constitution simply make for conciseness and clarity and that the decisions cited herein are fully as applicable to the new State Constitution as to the old.

The counter part of Sec. 4 of the Amendment of 1890 quoted above is Section 9 of Article V of the Missouri Constitution of 1945. It reads:

> "Sec. 9. Transfer of Causes to Supreme Court in Banc.—A cause in the supreme court shall be transferred to the court in banc when the members of a division are equally divided in opinion, or when the division shall so order, or on application of the losing party when a member of the division dissents from the opinion therein, or a federal question is involved, or pursuant to supreme court rule."

A learned annotator of the new Constitution comments that except for the concluding words "or pursuant to supreme court rule", the only substantial difference between Sec. 4 of the Amendment of 1890 and the last quoted new Section arises from the change in position within the section of the phrase "on application of the losing party."

The constitutional provisions with respect to the jurisdiction of the State court prior to the adoption of the 1945 Constitution were in a part of Section 12, Article VI, Missouri Constitution, 1875, which primarily created the St. Louis Circuit Court of Appeals, but also stated the jurisdiction of the State Supreme Court, and Sections 3 and 5 of the 1884 Amendments to the 1875 Constitution. Such pertinent provisions read:

> "Sec. 12. St. Louis Court of Appeals—jurisdiction—appeals to Supreme Court.—* * * Appeals shall lie from the decisions of the St. Louis Court of Appeals to the Supreme Court, and writs of error may issue from

the Supreme Court to said court in the following cases only; In all cases where the amount in dispute, exclusive of costs, exceeds the sum of two thousand five hundred dollars; in cases involving the construction of the Constitution of the United States or of this State; in cases where the validity of a treaty or statute of or authority exercised under the United States is drawn in question; in cases involving the construction of the revenue laws of this State, or the title to any office under this State; in cases involving title to real estate; in cases where a county or other political subdivision of the State or any State officer is a party, and in all cases of felony.

"Sec. 3, Amdt. 1884, provided, among other things, that 'the General Assembly shall have power by law * * * to increase or diminish the pecuniary limit of the jurisdiction of the court of appeals. * * *

"Sec. 5 Amdt. of 1884 reads as follows:

Sec. 5. Supreme Court, exclusive appellate jurisdiction of—In all causes or proceedings reviewable by the Supreme Court, writs of error shall run from the Supreme Court directly to the circuit courts and to courts having the jurisdiction pertaining to circuit courts, and in all such causes or proceedings, appeals shall lie from such trial courts directly to the Supreme Court, and the Supreme Court shall have exclusive jurisdiction of such writs of error and appeals, and shall in all such cases exclusively exercise superintending control over such trial courts."

The corresponding provisions of the 1945 Constitution are found in Section 3 of Article V thereof:

"Sec. 3. Jurisdiction of the Supreme Court.—The supreme court shall have exclusive appellate jurisdiction in all cases involving the construction of the Constitution of the United States or of this state, the validity of a treaty or statute of the United States, or any authority exercised under the laws of the United

BLEED THROUGH— POOR COPY

States, the construction of the revenue laws of this state, the title to any office under this state, the title to real estate, in all civil cases where the state or any county or other political subdivision of the state or any state officer as such is a party, in all cases of felony, in other classes of cases provided by law, and until otherwise provided by law, in all cases where the amount in dispute, exclusive of costs, exceeds the sum of seventy-five hundred dollars."

We think there is significance in the identity of the words drawn in question", with respect to the validity of a reaty or statute of the United States in Section 12, Article VI, Constitution 1875, and in Title 28, U. S. C., Sec. 344 Sec. 237, Judicial Code, amended).

It is also to be noted that the Supreme Court of Missouri olds that the word "involved" as used in the 1875 Constitution *in fixing the appellate jurisdiction* of the Missouri Supreme Court "implied that a constitutional question vas raised in and submitted to the trial court, and that uch court *had the opportunity to pass upon it.*" *Aufderheide* v. *Ice & Fuel Co.*, 319 Mo. 337, 4 S. W. 2d 776, l. c. 799; *Bennett* v. *Railway Co.*, 105 Mo. 642, 644, 16 S. W. 947, 948. This was in passing upon the procedural steps necessary to place jurisdiction in the Supreme Court of the State, and the only application here made is that when that jurisdiction has been acquired, and appellants claim that refusal to transfer the cause from the division to the court *en banc* violated a Federal right, the question being timely raised, the division of the court must determine whether an alleged Federal question is in fact involved in the record by proper procedure and then whether the alleged question is Federal in any sense.

In either case, under the cited decisions of the Missouri Supreme Court the question of transfer from division to the court *en banc* is strictly one of procedure of State law.

In *State* v. *Duestrow, supra,* cited and followed ever since 1896, where the application to transfer to the court *en banc* for an alleged Federal question was denied the Supreme Court *en banc* held that the unanimous decision of the three judges of Division 2 was final. Division 2 of the Supreme Court was "the highest court of a State in which a decision in the suit could be had." 28 U. S. C. Sec. 344 (Sec. 237, Jud. Code, Amended). In the instant case, the like final decision under the authorities cited was not only made by the unanimous concurrence of the four judges of Division 1 of the court, but it likewise was the judgment of a majority of the seven members of the entire court. Appellants could have no right under the Federal Constitution to control the law of Missouri as to what should be the highest court of the State in which a decision of the suit could be had. There could be no denial of equal protection of the law to appellants, because the supreme law of the State of Missouri vests in a division of its Supreme Court the judicial discretion to determine which cases decided in the division of the court involved a Federal question and which cases actually involved no such question. It might as well be argued that there was a denial of equal protection by the vesting of power in an appellate court to affirm or reverse cases on appeal.

In *A. T. & S. F. R. Co.* v. *Railroad Com.*, 283 U. S. 380, 75 L. Ed. 1128, this Court, through Chief Justice Hughes, said:

> "The decision of the state court is conclusive so far as the constitution and laws of the state are concerned."

In *Yazoo etc. R. Co.* v. *Mullins,* 249 U. S. 351, 63 L. Ed. 754, this Court, through Mr. Justice Brandeis, said:

> "Whether the case comes from a state court or a Federal court, this court will, for the purpose of de-

FILED THROUGH— POOR COPY

termining whether the error found may have been prejudicial, examine the whole record; state questions being left to the decision of the state court in cases coming here from those courts."

In *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86, 53 L. Ed. 417, this Court held:

> "The jurisdiction of this court to review the proceedings of the state courts, as we have had frequent occasion to declare, is not that of a general reviewing court in error but is limited to the specific instances of denials of Federal rights, whether those pertaining to the constitutionality of Federal or state statutes, or to certain rights, immunities, and privileges of Federal origin, specially set up in the state court, and denied by the rulings and judgment of that court."

In *Missouri ex rel.* v. *Public Service Com.*, 273 U. S. 126, 71 L. Ed. 575, on error to the Supreme Court of Missouri to review a judgment reversing the Circuit Court of Cole County, after the entry of the judgment below a statute of Missouri was enacted fixing a greater clearance for the location of a railroad track beneath the street than was involved in the litigation in the State court. This Court, after stating that:

> "Ordinarily this court on writ of error to a state court considers only federal questions and does not review questions of state law."

further held that though its appellate powers were not thus restricted when questions of State law arising after the decision below are presented in this Court, yet:

> "The meaning and effect of the state statute now in question are primarily for the determination of the state court. While this court may decide these questions, it is not obliged to do so, and in view of its nature, we deem it appropriate to refer the determina-

tion to the state court. Dorchy *v.* Kansas, supra, 290, 291 (68 L. Ed. 689, 690, 44 Sup. Ct. Rep. 323). In order that the state court may be free to consider the question and make proper disposition of it, the judgment below should be set aside, • • •"

In *U. S.* v. *Pink*, 315 U. S. 203, 86 L. Ed. 796, 62 S. Ct. Rep. 552, this Court, through Mr. Justice Douglas, held that:

"• • • we are not free to inquire as petitioner suggests, into the propriety under New York practice of grounding the motion for summary judgment on the record in the Moscow Case. *That is distinctly a question of State law on which New York has the last word.*" (Emphasis added.)

VI

The records show that "most if not all" of the questions referred to by the Missouri Supreme Court on page 592 of its opinion in 193 S. W. (2d) 588, and also many other questions raised by appellants on this appeal, have been decided adversely to appellants by courts of competent jurisdiction in suits brought by appellants or in which they actively participated, and that appellants have not only had their day in court but their months and years.

In several places in appellants' Jurisdictional Statement, they seemingly criticize the opinion of the Supreme Court in 193 S. W. (2d) 588, on account of the following recital appearing therein:

"They (the appellants) have not only had their day in court, but their months and years."

This statement follows the following recital therein (p. 592):

"Appellants make many other assignments of error; assailing the constitutionally of Missouri statutes

relating to partnership estates, and the probate laws of both Missouri and Kansas; ask us to declare void certain decisions of the Supreme Court of Kansas; invoke the treaty between this country and France in 1803 and the 'due process' and other provisions of the State and Federal Constitutions. Most if not all these questions have been decided adversely to appellants by courts of competent jurisdiction in suits brought by appellants or in which they actively participated as defendants. Moffett *v.* Moffett, 131 Kan. 582, 292 Pac. 947, 77 A. L. R. 294; Clark *v.* Andrews, 136 Kan. 23, 12 P. 2d 294; Clark *v.* Moffett, 136 Kan. 711, 18 P. 2d 555; Id. 290 U. S. 602, 54 S. Ct. 227, 78 L. Ed. 528; Moffett *v.* Robbins, D. C., 14 F. Supp. 602; Moffett *v.* Robbins, 10 Cir., 81 F. 2d. 431, Id. 298 U. S. 675, 56 S. Ct. 940, 80 L. Ed. 1397. Appellants have not been denied due process. They have not only had their day in court, but their months and years."

In the immediately following, and concluding paragraph, in referring to the above mentioned assignments of error, the Supreme Court said (p. 592):

> "None of these assignments is germane to the question of whether the fifth amended petition contains a misjoinder of parties plaintiffs or fails to state a joint cause of action. We hold that the judgment is correct in form and in accordance with law and it is therefore affirmed."

It is thus evident that the Missouri Supreme Court deemed these assignments as having no significance in the light of the actual issues involved before it, and that the only constitutional question attempted to be passed upon, or which was passed upon by the court, was the contention that Section 948 violated the provisions of Section 10 of Article I of the Constitution of the United States relating to bills of attainder. As will elsewhere appear herein, the

Missouri Supreme Court properly held that this contention was unsubstantial and frivolous.

The opinions in *Moffett* v. *Clark*, 131 Kan. 582 (rendered November 8, 1930), *Clark* v. *Moffett*, 136 Kan. 711 (rendered January 28, 1933), and *Clark* v. *Andrews*, 136 Kan. 923, are all expressly referred to in the Fifth Amended Petition, and by reason of the pleading thereof, under the provisions of Section 958, R. S. Mo. 1939, reading as follows:

> "Sec. 958.—In every action or proceeding wherein the law of another state of the United States of America is pleaded, the courts of this state shall take judicial notice of the public statutes and judicial decisions of said state. R. S. 1929, Sec. 806."

the Missouri Supreme Court took judicial notice of these opinions, as well as of the laws, statutes and decisions of the State of Kansas. The record (*507-514) (*521-535) in the *Howard* fee case (345 Mo. 741, 137 S. W. 2d 507) shows that the opinions in *Moffett* v. *Robbins*, 14 Fed. Supp. 602, and *Moffett* v. *Robbins*, 81 F. (2d) 431, were offered in evidence therein, and under the following pronouncements in the case of *Knorp* v. *Thompson*, 352 Mo. 44, l. c. 52, 175 S. W. (2d) 889, l. c. 894:

> "Of course, a court can judicially notice its own records, and courts, when justice requires, should and do, in deciding a case, consider the records of other cases, as '* * * where the interests of the public in ascertaining the truth are of paramount importance, as also in cases where the court is seeking to determine what is a reasonable exercise of its discretion, or whether the present proceeding is merely a moot one. And 'there may be cases so closely interwoven, or so clearly interdependent as to invoke' a rule of judicial notice in one suit of the proceedings in another suit.' "

the Supreme Court of Missouri was entitled to take judicial notice of these two opinions.

The records of this Court will show that on or about June 23, 1933, Grace Torrance Clark as the Kansas Administratrix of the Thomas S. Moffett Estate, and Louise McGrew Moffett as sole beneficiary of Thomas S. Moffett, filed in this Court, petition for writ of certiorari to review the case of *Clark* v. *Moffett,* 136 Kan. 711; that said petition was docketed therein as cause No. 181, and that this Court on October 9, 1933, denied certiorari therein (290 U. S. 642, 78 L. Ed. 558), and on December 11, 1933, this Court denied petitioners leave to file petition for rehearing (290 U. S. 602, 78 L. Ed. 528).

The records of this Court will show that on or about April 11, 1936, Louise McGrew Moffett, as Executrix of the Estate of Thomas S. Moffett, deceased, and Louise McGrew Moffett, individually, filed in this Court, petition for writ of certiorari to review the case of *Moffett* v. *Robbins,* 81 F. (2d) 431; that said petition was docketed therein as cause No. 918, and that this petition was denied on May 18, 1936 (298 U. S. 675, 80 L. Ed. 1379).

We have compiled and are placing in the Appendix hereto, pages 152-157 inclusive, the respective Specifications of Error set forth in these petitions, respectively.

The Specifications of Error will clearly disclose that most, if not all of the questions attempted to be raised in the instant case were previously raised in the Supreme Court of Kansas, and in the Tenth Circuit Court of Appeals, and were brought to the express attention of the United States Supreme Court in Petitions for certiorari. Reference will be further made to these Specifications in other parts of this

Statement

The records of this Court in said cause No. 181 will also show the following at the respective pages of the record in said cause set opposite thereto:

1. Findings of fact and conclusions of law in the Harper County District Court, pages 531 (484) to 572 (525), which findings included Commerce Trust Company's Exhibit No. 8, which is referred to in Finding No. 27, page 545 (498), as provided in the following recital in Finding No. 27:

> "A true copy of said report is attached hereto as a part of the findings of the Court."

Said Exhibit No. 8 attached thereto appears in full on pages 572 (525) to 594 (548).

2. Plaintiffs' motion to change, modify, strike out, and make additional findings of fact and conclusions of law, pages 595 (549) to 616 (570).

3. Journal entry of the Harper County District Court, pages 624 (578) to 629 (583).

Journal entry of judgment of the Harper County District Court, pages 629 (583) to 660 (614).

4. Finding of fact No. 24 appears beginning at 543 (496).

5. Plaintiffs' requested finding No. 13 appears pages 601-603 (555-557).

6. Stipulation concerning accounting, pages 160-161 (126-127).

In giving the above citations to the record, the first figures mentioned are the numbering given to the record by the Clerk of the Supreme Court of the United States, and the figures second appearing are the pages of the record in the transcript filed in the Supreme Court of Kansas.

Under its decisions hereinafter referred to, the United States Supreme Court will take judicial notice of its records in connection with these certiorari proceedings.

We particularly refer to the court's findings of fact and conclusions of law, and the findings of fact and conclusions of law requested by the then plaintiffs, now appellants, in the Harper County, Kansas, District Court proceedings, and the judgment entry of that court, appearing respectively on the above pages in the Abstract of the Record filed in this Court in the aforesaid case No. 181. In other parts of this Statement we will comment concerning some of the recitals therein.

For the convenience of the Court, we are setting forth in an Appendix attached hereto, on pages 110-119, inclusive thereof, the opinion of the Supreme Court in the case of *Moffett* v. *Moffett*, 131 Kan. 582, and on pages 119-133 thereof, the opinion of the same Court in the case of *Clark* v. *Moffett*, 136 Kan. 711, and on pages 134-146 thereof, inclusive, the opinon in the case of *Moffett* v. *Robbins*, 81 F. (2d) 431. Under its decisions hereinafter referred to, the United States Supreme Court will take judicial notice of its records in connection with these certiorari proceedings.

The Supreme Court of Missouri would likewise have been entitled to take judicial notice of the case of *Moffett* v. *Moffett*, 131 Kan. 546, 292 Pac. 942, mentioned and set forth above in *Clark* v. *Moffett*, 136 Kan. 711, on account of the following recital therein (l. c. 713):

> "The will of John Moffett had been construed as it affected some of the beneficiaries, both by this court (Moffett *v.* Moffett, 131 Kan. 546, 292 Pac. 942) and by the Supreme Court of Missouri (Zombro *v.* Moffett (Mo.), 44 S. W. 2d 149)."

The Supreme Court of the United States would likewise be entitled to take judicial notice of the case of *Moffett* v. *Moffett*, 131 Kan. 546, because its records show that on or about February 2, 1931, Louise McGrew Moffett and Grace Torrance Clark, Administratrix, filed in this Court petition for writ of certiorari to review the decision of the Supreme Court of Kansas in the last named case; that said cause was docketed therein as cause No. 700, and that therein the petitioners asserted that the judgment denied Thomas S. Moffett the equal protection of the laws of the State of Kansas, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and that by such decision, T. S. Moffett was deprived of the full enjoyment and possession of property "in violation of the command of Section 1 of the Fourteenth Amendment to the Constitution of the United States."

The petition in this case contains the following recital:

> "T. S. Moffett, one of the parties against whom the suit was instituted in the District Court of Comanche County, Kansas, and who was the appellant in the Supreme Court of the State of Kansas in the case sought to be reviewed herein, died on December 22, 1930, after judgment and after his motion for a rehearing was filed and denied.
>
> "Thereafter, said cause was duly revived in the names of your petitioners in the Supreme Court of the State of Kansas, to-wit Louise McGrew Moffett, widow and sole beneficiary under the will of T. S. Moffett, and Grace Torrance Clark, administratrix with the will annexed in Kansas of the estate of T. S. Moffett, by substituting them as appellants, in lieu of the said T. S. Moffett, during the judgment term."

The records of this Court show that this Court, on March 9, 1931, denied certiorari (283 U. S. 825, 827, 75 L. Ed. 1440).

Elsewhere in this Statement further reference will be made to the issues in the District Court and in the Kansas

Supreme Court and in the United States Supreme Court in said case, and reference will also be made to the application thereof to certain allegations in the Fifth Amended Petition.

In another section of this Statement, reference will be made to the questions raised by appellants in these three certiorari proceedings, and therefrom it will, we think, expressly appear that before this Court appellants raised many of the identical questions now raised by them in their Jurisdictional Statement, and it will, we think, appear therefrom that "most if not all" of the questions now raised were raised by them, and decided adversely to them, and it is to be presumed that appellants raised in the certiorari proceedings, all questions which they deemed of any significance.

The limitation upon our time will prevent a thorough review of what appears in the above mentioned opinions of the Supreme Court of Kansas and in the above mentioned cases of *Moffett* v. *Robbins,* 14 Fed. Supp. 602, and 81 F. (2d) 431. However, in view of appellants' present contention, we invite consideration of all these cases, and particularly the case of *Moffett* v. *Robbins,* 81 F. (2d) 431, because therein Judge Bratton reviewed a petition of the same appellants, prepared by the same lawyers, raising many of the questions which are now attempted to be raised by appellants' attorneys. This case involved a proceeding instituted by Louise McGrew Moffett individually and as Executrix of the Estate of Thomas S. Moffett, deceased, against R. O. Robbins, Ancillary Administrator in Kansas With the Will Annexed of the Estate of John Moffett, Deceased (charging conspiracy between Helen Moffett, said R. O. Robbins, Commerce Trust Company, and others, the alleged nature of which is set forth in said opinion (l. c. 434), to enjoin the enforcement of the judgment

rendered by the District Court of Harper County, Kansas, which was affirmed by the Supreme Court of Kansas in 136 Kan. 711. This opinion is particularly important because it sets forth in great detail, contentions therein raised by the appellants and disposes of all of the same with unusual directness and clarity. The Court disposed of, adversely to appellants, many of the contentions now raised by appellants. We shall later refer to some of the recitals therein, but in view of the present contention of the appellants that there was no adversary trial in the Harper County suit, we now reproduce what Judge Bratton said reference to that contention made in the bill filed by the present appellants in the District Court of Kansas, as follows (*Moffett* v. *Robbins,* 81 F. (2d) 431, l. c. 437):

> "(13) The judgment is assailed on the further ground that there was no adversary trial. Louise McGrew Moffett, as sole beneficiary of the estate of Thomas S. Moffett, Grace Torrance Clark as administratrix with the will annexed of that estate and administering the estate of Moffett Bros. in Kansas, and all others having any interest in the estate of the partnership, were parties to the action. The purpose of the proceeding was an accounting and partition; the issues were formed and the crux of the litigation concerned itself very largely with the asserted claim that the partnership was indebted to the estate of John Moffett. Louise McGrew Moffett and Grace Torrance Clark together waged vigorous but unsuccessful opposition to that claim. Counsel who represented them were paid $3,900 from the partnership funds as compensation for their service. Grace Torrance Clark made such payment. The trial consumed several days; all questions were seemingly considered thoroughly; extended findings of facts and conclusions of law were made dealing with every feature of the complicated situation; and an exhaustive judgment was entered. In these circumstances, the mere allegation that there

BLEED THROUGH– POOR COPY

was no adversary trial is a conclusion which the record affirmatively disproves."

In addition to the foregoing cases, we are bringing to the attention of the United States Supreme Court, the following from the opinion in the case of *Clark* v. *Moffett,* 136 Kan. 711, l. c. 713:

> "The action came to this court on the pleadings (*Moffett* vs. *Moffett,* 131 Kan. 582 292 Pac. 947), where it was determined that the accounting prayed for was proper.
>
> "When the action went back to the trial court, broadly speaking, the only controversy between the parties was with respect to the accounting. The will of John Moffett had been construed as it affected some of the beneficiaries, both by this court (*Moffett* vs. *Moffett,* 131 Kan. 546, 292 Pac. 942) and by the supreme court of Missouri (*Zombro* v. *Moffett,* (Mo.) 44 S. W. 2d 149). There was no longer any controversy among the parties as to the share or interest which each of them should receive in the land to be partitioned except as the same might be modified by the accounting.
>
> "Broadly speaking, there were but three things to be determined in the accounting. First, were Moffett Brothers indebted to John Moffett individually at the time of his death, and if so, in what sum? Second, was Thomas S. Moffett indebted to the partnership of Moffett Brothers, and if so, in what sum? and third, was the Moffett Brothers Cattle, Land and Lumber Company indebted to Moffett Brothers, and if so, in what sum?

In view of the many unwarranted questions now raised by appellants, we think it not amiss to further quote from *Clark* vs. *Moffett,* 136 Kan. 711, l.c. 714, as follows:

> "This controversy, so comparatively simple in its broader aspects, as above outlined, has been complicated by the manner in which the litigation has been conducted by injecting into it a number of questions

relating to practice or procedure and technical questions, many of which have little or no substantial merit, with the result that the parties have presented to this court for its analysis and its consideration 1740 pages of printed abstracts and briefs."

That the appellants in that case did raise therein many of the questions now sought to be raised in the instant proceeding, is readily apparent by the following statements appearing in *Clark* v. *Moffett*, 136 Kan. 711, l. c. 720:

"Appellants contend that the Commerce Trust Company is without capacity to represent the Moffett Brothers partnership in this action. When the case was in this court before, one of the points determined was that it was proper for the trial court to permit the Commerce Trust Company to intervene in this action in its capacity as administrator of the partnership estate of Moffett Brothers. Ignoring the former determination of this question, appellants present two reasons in support of their contention. First, that the appointment was made by one who assumed to act as special judge, or judge pro tem., of the probate court of Jackson County, Missouri, who was not so chosen in accordance with the constitution and statutes of Missouri, therefore his order making the appointment is void. The trial court found that his selection was made on accordance with the constitution and statutes of Missouri, as interpreted by the supreme court of that state. The finding appears to be sound. But, passing that, he was there acting as judge of the probate court and did make the appointment. No appeal has been taken from that order. The Commerce Trust Company has been acting under the appointment since December 28, 1928. He was at least a judge de facto. The regularity of his appointment, or his acts as judge, cannot be collaterally attacked in this proceeding. (Briggs *v.* Voss, 73 Kan. 418, 85 Pac. 571; Keys *v.* Keys, 83 Kan. 92, 109 Pac. 985.) Second, it is argued that even if the appointment of the Commerce

BLEED THROUGH– POOR COPY

Trust Company in that capacity was made, it was for Missouri only and did not authorize it to appear in Kansas. Our statute (R. S. 22-1308) authorizes an administrator of another state to sue or be sued in this state."

In that case the Supreme Court of Kansas (l. c. 723) also passed on the contention of the then plaintiffs, now appellants, that they did not have a fair trial therein, by the use of the following language:

"Finally it is contended plaintiffs did not have a fair trial, and that this is indicated by rulings and remarks of the court as the trial progressed. We have carefully examined the record and all counsel have said on this point and find the contention to be devoid of merit."

Appellants now contend that there was no adversary trial in this case. In view of this contention, what is said by the Kansas Supreme Court in *Clark* v. *Moffett*, 136 Kan. l. c. 724, we think clearly disproves and refutes this contention:

"The third item is the one around which the battle of the trial raged. Much feeling was displayed. What caused this, or who is to blame for it, we shall not pause to consider, if, indeed, the record discloses. Perhaps because of it many contentions were made which were not well founded. Some tactics were indulged in, the obvious purposes of which were to impede rather than to aid the orderly administration of justice. With this attitude prevalent it is fortunate that the trial was before an able and experienced trial judge who could winnow the wheat from the chaff. While doing so the court gave the parties ample time for trial and a fair opportunity in the introduction of evidence. The judgment is fully sustained by the evidence, and, as we view it, in its main features, at least, is the only one which properly could have been reached from the evidence."

The Supreme Court of the United States will also take judicial notice of the following recital in *Clark* vs. *Moffett*, 136 Kan. 711, l. c. 721, 722:

> "Thereafter Louise McGrew Moffett filed a petition for removal to the federal court of what was alleged to be a separable controversy between herself and the defendants Renwick J. Moffett and Joseph W. Moffett with respect to the indebtedness of the estate of Moffett Brothers to the estate of John Moffett, and alleging diverse citizenship. When this was presented to the trial court it refused to order a removal of the cause. A transcript of the proceedings was duly filed in the United States district court. That court, after a hearing, ordered it to be remanded to the state court. There was, of course, no separable controversy between Louise McGrew Moffett on the one hand and Renwick J. Moffett and Joseph W. Moffett on the other with respect to the indebtedness of Moffett Brothers to the estate of John Moffett."

The court will also take judicial notice that the Supreme Court of Kansas reviewed, considered and passed upon the contention that there had been no revivor of the Harper County judgment, and expressly ruled that the cause was properly revived (l. c. 721).

Under its decisions, had it been necessary to do so, the Missouri Supreme Court would have been entitled to take judicial notice of its opinion in the case of *Zombro v. Moffett*, 44 S. W. (2d) 149, above referred to.

It is also interesting to note that in 193 S. W. (2d), 588, which contains Judge Clark's opinion in the instant case, the West Publishing Company in publishing same, places immediately following the syllabi, the following recital: "See, also, 237 M. A. 375, 162 S. W. (2d) 591."

We assume that this was done because of the following language appearing on page 591 of Judge Clark's opinion:

> "The withdrawal of paragraph 45, which related to a suit brought by respondent Kopp against Mrs.

BLEED THROUGH– POOR COPY

> Moffett, in no way affected the point made in the demurrers as to misjoinder of parties plaintiff or failure to state a cause of action."

The case mentioned by West Publishing Company is the identical case about which complaint was made in withdrawn paragraph 45.

In the light of the foregoing, it seems to us that there is no possible justification for the contentions made by appellants that Judge Clark in his opinion erroneously stated that "They have not only had their day in court, but their months and years."

Appellees Helen Weede and Commerce Trust Company, as respondents in the instant case in the Missouri Supreme Court filed therein for the convenience of the Court:

> "Extracts from Appellants' Abstract of the Record in Cause No. 36089 in the Supreme Court of Missouri, entitled 'In re Moffett Brothers Partnership Estate,' known as the Howard Fee Case (the opinion in which is reported in 345 Mo. 741, 137 S. W. 2nd, 907), prepared and furnished by respondents, Helen Weede and Commerce Trust Company"

explaining the reasons therefor by the following recital appearing on the cover page thereof:

> "(This photographic reproduction of said extracts is furnished because said Respondents have been informed that the files of the Court contain only one copy of Appellants' Abstract of the Record in said last named cause; and this compilation is furnished solely for the convenience of the Court.)"

and further explaining by the following recital appearing thereon:

> "This compilation contains the following pages of said appellants' Abstract of the Record, reproduced in page sequence: 116 to 254; 337 to 363; 701 to 733; 755; 756; 879 to 881; 998 to 1026; 1071 to 1086; 1095 to 1098; 1132 to 1135; 1142; 1146; 1147; 1150; 1152.

The Exhibits bound in the original Abstract between pages 224 and 225, appear in this compilation between pages 225 and 226."

This was done because the Supreme Court of Missouri was entitled to take judicial notice of the record in the *Howard Fee* case (345 Mo. 741), above referred to, which was a companion case, and expressly brought to the attention of the Missouri Supreme Court by appellants in numerous places in their Fifth Amended Petition, and directly raised again on appeal, and by their Jurisdictional Statement the action of the Supreme Court therein concerning same is now made the basis of further alleged grounds of complaint.

These abstracts from the record contain, on the following pages, the following, all of which were offered and received in evidence in the *Howard Fee* case:

1. Petition for an Accounting and Partition, filed by Thomas S. Moffett in the Harper County District Court (*113 to *122, both inclusive).

2. Amended Seperate Reply of Grace Torrance Clark (*701 to *731, both inclusive).

3. Amended Separate Reply of Louise McGrew Moffett (*731 to *733, both inclusive).

4. Stipulation in the Harper County suit signed by all of the parties plaintiff and defendant (*755, *756).

5. Journal Entry of Judgment in said cause, including Findings of Fact and Conclusions of Law (and also including Exhibit 8) (*116 to *253, both inclusive).

6. Motion to Change, Modify, Strike Out and Make Additional Findings of Fact and Conclusions of Law, filed by plaintiffs on January 12, 1932 (*337 to *361, both inclusive).

We are also reproducing in the Appendix, on pages 146-151 inclusive, the opinion of Judge Hopkins of the United

BLEED THROUGH- POOR COPY

States District Court of Kansas in the case of *Moffett* v. *Robbins*, 14 Fed. Supp. 602.

Paragraph 25 of the Fifth Amended Petition (236 to 240), among other things, refers to the partnership estates of Andrews, Lewis and Moffett, in which Thomas S. Moffett had a one-third interest, and of Moffett Brothers and Andrews, in which said Thomas S. Moffett had a one-third interest. Thomas S. Moffett, after the death of John Moffett, took over the administration of these two partnership estates in Kansas with the consent of said Andrews, the then remaining partner. Shortly after the death of Thomas S. Moffett, Grace Torrance Clark secured an order in the Probate Court of Wyandotte County directing her to take possession of these two partnership estates and filed bond. Shortly thereafter, said Andrews filed a motion in the Probate Court of Wyandotte County, in which he asked leave to have the Court modify its order appointing Mrs. Clark. On the 30th day of March, 1931, the Court entered its order modifying its order so appointing her. The effect of this order was to withdraw from Mrs. Clark the right to administer these two partnership estates. The order was appealed to the District Court of Wyandotte County, which reversed the decision of the Probate Court. The case of *Clark* v. *Andrews*, 136 Kan. 23, 13 Pac. (2d) 294, contains the opinion on the appeal from the District Court of Wyandotte County. The Supreme Court in that case reversed the judgment of the District Court, with directions to sustain the order of the Probate Court from which the appeal to the District Court was taken.

These last named facts are taken from recitals appearing in the opinion in the case of *Clark* v. *Andrews, supra*, as well as from recitals in said Paragraph 25.

In Paragraph 25 of the Fifth Amended Petition, appellants seek to challenge the correctness of the above

mentioned opinion of the Supreme Court. As we construe paragraph 25, they also seek to recover damages on account of the appointment of said Andrews.

We shall not lengthen this Statement by reviewing the case of *Clark* v. *Andrews*, which covers almost eight pages, but shall content ourselves with reproducing the syllabi of the court in the opinion filed on July 9, 1932, which, as this Court knows, has peculiar significance under the constitution and laws of the State of Kansas:

> "1. A probate court has authority at a subsequent term to which a matter has been continued to enter an order modifying its original order entered at the prior term appointing an administrator of partnership estates.
>
> "2. Where a partnership composed of three persons is dissolved by the death of one, and administration of the partnership estate is commenced by one of the survivors with the consent of his cosurvivor and the administering partner dies before such administration is completed, the remaining partner upon complying with the provisions of R. S. 22-405 is entitled to administer upon the partnership assets as against the administratrix of the administering partner.
>
> "3. The provisions of R. S. 22-328 that letters testamentary and of administration shall in no case be granted to a nonresident of this state will not be applied to defeat the right of a nonresident surviving partner to administer upon the assets of the partnership."

It thus appears from this opinion that the Supreme Court of Kansas, which is the court of last resort in the State of Kansas, expressly decided against all these contentions of appellants.

Reference to this matter is incorporated herein because the case of *Clark* v. *Andrews* is one of the cases mentioned on page 592 of the opinion of the Supreme Court of

BLEED THROUGH– POOR COPY

Missouri in the instant case, as being one where the matters of complaint were decided against appellants by a court of competent jurisdiction.

In many places in the Fifth Amended Petition, appellants make purported quotations from *Moffett* v. *Moffett*, 131 Kansas 582, *Clark* v. *Moffett*, 136 Kan. 711, and many other Kansas decisions. Examination of the Fifth Amended Petition will show in many instances the inclusion of asterisks in these quotations. We have reviewed all of these quoted excerpts in the light of the omission of recitals indicated by asterisks, and respectfully submit that in many instances these omissions and elisions result in false and erroneous application of the quoted excerpts, and the wresting and stripping of certain parts from their context.

The stipulation for accounting hereinbefore referred to on pages 56 and 66 of this part of this Statement, appears in full in the Abstract of the Record in the *Howard Fee* case, on pages (*755, *756) and is in words and figures as follows (omitting the signatures of parties other than the plaintiffs):

> "In the District Court of Harper County, Kansas Grace Torrance Clark, Administratrix etc., et al. Plaintiffs *v.* Helen Moffett, et al. Defendants and Commerce Trust Company, Executor etc., and R. O. Robbins, Administrator with the will annexed of John Moffett, deceased, Intervenors No. 7374.
>
> STIPULATION
>
> "We, the undersigned, being all of the parties, plaintiff, defendant and intervenors in the above entitled cause hereby stipulate and agree that said cause may be set down for a hearing on Wednesday, October 14th, 1931, before the court at 10:30 o'clock a. m. on said day and further stipulate that in the event an accounting should be ordered by the court herein the said parties hereto hereby agree that further proceedings in said

cause shall go forward without delay, or at such time as the court may order.

GRACE TORRANCE CLARK *Admx.*
LOUISE McGREW MOFFETT

Plffs.

By A. E. WATSON *their Atty.*"

The record in the *Howard Fee* case shows (*117, *118):

"* * * and, thereupon the said defendant Helen Moffett presented her motion for a preliminary judgment for an accounting in this action together with a stipulation on file in words and figures as follows, to-wit:

(Here appear the recitals in the body of the above stipulation.)

"And thereupon the Court after argument and statements of counsel and being fully advised in the premises, does sustain said application and it is then and there by the court ordered, adjudged and decreed that all parties to this cause, plaintiffs, defendants and intervenors be and they are hereby ordered to account as to said Moffett Brothers partnership affairs, business and property; and by virtue of the stipulation as aforesaid the accounting is ordered to go forward without delay and thereupon the court announced the burden of proof to be upon the defendants and the intervenors."

In the light of the foregoing, it seems to us that there is no possible justification for the contentions made by the appellants that the Missouri Supreme Court in its opinion in the instant case, erroneously stated:

"Most if not all of these questions have been decided adversely to appellants by courts of competent jurisdiction in suits brought by appellants or in which they actively participated as defendants,"

BLEED THROUGH- POOR COPY

or erroneously stated that:

> "They have not only had their day in court, but their months and years."

VII

Judicial Notice (a) This Court will take judicial notice of its records in former cases companion to and interrelated with the instant case, and growing out of transactions pleaded in the instant case, where this Court has denied certiorari on such former cases. (b) The Supreme Court of Missouri in the instant case was entitled to take judicial notice of its own records in former cases closely interwoven with, companion to and interdependent with the instant case and to take judicial notice of the public statutes and judicial decisions of the State of Kansas pleaded in the instant action. (c) The Circuit Court of Jackson County, Missouri, in the instant case was entitled to take judicial notice of all prior proceedings of said Circuit Court and of any division thereof in the instant case, all of the divisions thereof constituting but a single court. (Appellants' Assignment of Errors, Nos. 1 to 13 both inclusive, 25, 27, 28, 32, 35 and 36.)

(a) Matters of Which this Court Will Take Judicial Notice Herein

It is incumbent upon the appellees to bring to the attention of this court the matters of which they desire judicial notice to be taken. *Shapleigh* v. *Mier*, 299 U. S. 468, 81 L. Ed. 355, 57 S. Ct. 261. We therefore solicit the attention of the court to its records in the following cases as appellants are seeking in the instant case to avoid the effects of the adverse judgments in each thereof:

1. *Helen Moffett, Appellee,* v. *Thomas S. Moffett et al., Appellants,* 131 Kan. 546, certiorari denied by

this court March 9, 1931, 283 U. S. 826, 75 L. Ed. 1440, 51 S. Ct. Rep. 351.

2. *Grace Torrance Clark, et al., Appellants,* v. *Helen Moffett, et al., Appellees,* 136 Kan. 711, 18 Pac. (2d) 555, certiorari denied by this court October 9, 1933, 290 U. S. 642, 78 L. Ed. 558, 54 S. Ct. Rep. 61, Leave to file petition for rehearing denied Dec. 11, 1933, 290 U. S. 602, 78 L. Ed. 528, 54 S. Ct. 227.

3. *Louise McGrew Moffett, individually and as executrix, etc., Appellants,* v. *R. O. Robbins, Admr. etc., Appellees,* 81 F. (2d) 431, affirming 14 Fed. Supp. 602, certiorari denied by this court May 18, 1936, 298 U. S. 675, 80 L. Ed. 1397.

At appropriate places, we have referred to and set out the respective Assignments of Error made in the applications to this court for certorari in each of the above cases, showing the contentions made on this appeal which have been heretofore presented to this court in each of the former cases.

In *U. S.* v. *Pink,* 315 U. S. 203, 86 L. Ed. 796, 62 S. Ct. 552, this court, through Mr. Justice Douglas, held that this court will take such notice of a foreign law as the state court whose judgment is under review could have taken and that where it was contended the complaint and the defense were substantially the same in the instant case as in a former one, where the judgment was affirmed in the United States Supreme Court and the former case was not *res judicata* since respondent was not a party thereto, that the United States Supreme Court would take judicial notice of the record in the former case, including the evidence contained in the record. As to the latter point, the court said; 315 U. S. l. c. 216, 86 L. Ed. l. c. 810, 811:

> "The upshot of the matter is that we now reach the issues in Moscow F. Ins. Co. Case in so far as they are

BLEED THROUGH– POOR COPY

embraced in the pleadings in this case. And there is no reason why we cannot take judicial notice of the record in this Court of the Moscow F. Ins. Co. Case. Bienville Water Supply Co. *v.* Mobile, 186 U. S. 212, 217, 46 L. Ed. 1132, 1134, 22 S. Ct. 820; Dimmick *v.* Tompkins, 194 U. S. 540, 548, 48 L. Ed. 1110, 1113, 24 S. Ct. 780; Freshman *v.* Atkins, 269 U. S. 121, 124, 70 L. Ed. 193, 195, 46 S. Ct. 41, 6 Am. Bankr. Rep. (N. S.) 744. • • •

"We do not stop to review all the evidence in the voluminous record of the Moscow F. Ins. Co. Case bearing on the question of the extraterritorial effect of the Russian decrees of nationalization, except to note that the expert testimony tendered by the United States gave great credence to its position."

As to judicial notice of foreign law which the Supreme Court of Missouri could take, and consequently which this court can take under *U. S.* v. *Pink, supra,* Sec. 958 R. S. Mo. 1939, reads:

"In every action or proceeding wherein the law of another state of the United States of America is pleaded, the courts of this state shall take judicial notice of the public statutes and judicial decisions of said state."

The Fifth Amended petition ruled upon in the instant case pleads *Clark* v. *Moffett,* 136 Kan. 711 (164, 230 and elsewhere). It pleads the companion cases of *Clark* v. *Andrews,* 136 Kan. 23 (238, 239), and *Moffett* v. *Moffett,* 131 Kan. 582 (231). It pleads a multitude of statutes and other decisions of the State of Kansas. (166, 167, 179, 180, 186, 187 to 193, 200 to 208, 236, 239, 240, 245, 250, among others.)

The Fifth Amended Petition also pleads by date of rendition and alleged points covered, the decision of the Supreme Court of Missouri in the *Howard Fee* case, 345 Mo. 741, 137 S. W. 2, 507. This is mentioned here as an aside, because it clearly brings the *Howard Fee* case opinion before this court.

In *Corbett* v. *Terminal Railroad Assn.*, 336 Mo. 972, l. c. 980, 82 S. W. 2, 97, the Supreme Court of Missouri held with reference to Sec. 958, R. S. Mo. 1939 that:

> "We readily agree that under our statute the proper pleading of the law of another state requires our courts to take judicial notice not only of the law itself, such as a statute of such state, but also of the judicial decisions of such state interpreting or construing such law or statute. (Ramey *v.* Railroad, 323 Mo. 662, 21 S. W. 2d 873, 877, Menard *v.* Goltra, 328 Mo. 368, 40 S. W. 2d 1053.)"

This Court takes judicial notice of its own records in a pending cause and also of records in cases formerly lodged in that court whether they be companion or interrelated proceedings or those formerly had therein by one of the parties to the pending case in which judicial notice of the record of the former case is taken.

This is true as to the record of denial by the Supreme Court of certiorari at a previous stage in the same case. *Aspen Mfg. & Smelting Co.* v. *Billings*, 150 U. S. 31, 37 L. Ed. 986; and it is also true as to denial of certiorari by the United States Supreme Court in another case growing out of the same general subject matter or controversy. *Friezler* v. *Boatmen's Bank*, 212 U. S. 364, 53 L. Ed. 551, l. c. 556, 557.

Under the former practice, where in a murder case the United States Supreme Court had dismissed a writ of error to the highest court of the State for lack of Federal jurisdiction, on a subsequent appeal from an order of the United States Circuit Court denying *habeas corpus* this court not only took judicial notice of its denial of a writ of error in the murder case but further assumed that in the application for such writ of error no point "on which the jurisdiction might have been sustained was overlooked," 42 L. Ed. l. c. 409.

BLEED THROUGH– POOR COPY

In *DeBearn* v. *Safe Deposit & T. Co.*, 233 U. S. 24, 58 L. Ed. 833, an appeal from the U. S. District Court to review a decree sustaining a demurrer to and dismissing a bill, the judgment being that the cause be dismissed for want of Federal jurisdiction, the first syllabus in 58 L. Ed. reads:

> "A direct appeal from a Federal district court to the Supreme Court may not be maintained on the theory that rights under the Federal Constitution were involved, *where the supposed constitutional questions have already been twice decided by the Supreme Court to be so wanting in merit as not to afford ground for the exercise of jurisdiction to review the judgments of a state court of last resort.*" (Emphasis added.)

The above seems very pertinent to the instant case. The opinion by Chief Justice White, holds:

> " 'We take judicial notice of our records, and, if not res judicata, we may, on the principle of stare decisis, rightfully examine and consider the decision in the former case as affecting the consideration of this;' and again, as further declared in Dimmick *v.* Tompkins, 194 U. S. 540, 548, 48 L. Ed. 1110, 1113, 24 Sup. Ct. Rep. 780; 'The court has the right to examine its own records and take judicial notice thereof in regard to proceedings formerly had therein by one of the parties to the proceedings now before it.' Availing of this power and making reference to the records of this court, it appears that the *controversy as to the validity of the attachments with which the appeal before us is concerned has, on three different occasions, been here considered.*" (Emphasis added.)

In *Bienville Water Supply Co.* v. *Mobile*, 186 U. S. 212, 46 L. Ed. 1132, an appeal from the U. S. Circuit Court the following is from the opinion by Mr. Justice Brewer:

> "It appears that the decree in the other suit was rendered in the circuit and affirmed in this court about seven months before the decision of the present case in

the circuit court. As against this, it may be said that the decree in the other suit was neither pleaded nor proved, and no question of res judicata can be considered unless the earlier decision is formally presented on the hearing of the later case. This, doubtless, is technically true, but we take judicial notice of our own records, and, *if not res judicata, we may, on the principle of stare decisis, rightfully examine and consider the decision in the former case as affecting the consideration in this.*" (Emphasis added.)

(b) Judicial Notice by Missouri Supreme Court of Its Own Records in Other Cases

The Missouri Supreme Court will take judicial notice of the record before it in other cases when the public interest in ascertaining the truth is of paramount importance; where the cases are so interwoven or interdependent as to invoke a rule of judicial notice, and this is true even as to taking notice in one division, of the stricken portion of an answer in the record of the former suit in the other division of the court. In *Sabol* v. *St. Louis Cooperage Co. Mo. Div. 2*, 31 S. W. 2, 1041, l. c. 1043, it was held:

"The errors assigned by plaintiff to the subsequent action of the trial court in sustaining defendant's objection to the introduction of evidence must be determined upon the pleadings as they were before that court, after part of defendant's answer had been stricken. It does not follow, however, that we are precluded from considering the opinion of Division 1, because that part of defendant's answer embodying the same was stricken out. That opinion is part of the records of this court, of which we take judicial notice. 23 C. J. 110 #1918; Keaton *v.* Jurndt, 259 Mo. 179, 168 S. W. 734."

And in *Knorp* v. *Thompson*, 352 Mo. 44, l. c. 52, 175 S. W. 2, 889, l. c. 894, it is said:

"Of course a court can judicially notice its own records, and courts, when justice requires, should and do,

BLEED THROUGH– POOR COPY

in deciding a case, consider the records of other cases, as '• • • where the interests of the public in ascertaining the truth are of paramount importance, as also in cases where the court is seeking to determine what is a reasonable exercise of its discretion, or whether the present proceeding is merely a moot one. And 'there may be cases so closely interwoven, or so clearly interdependent as to invoke a rule of judicial notice in one suit of the proceedings in another suit.' 23 C. J., pp. 113-114; Thompson *v.* Scott, supra. See also 31 C. J. S., Evidence, sec. 50.' ''

(c) Judicial Notice Taken by Missouri Circuit Courts of Its Records in the Same Case

Judge Ridge, in ruling upon the Fifth Amended Petition, properly took judicial notice of all prior proceedings and rulings by his colleagues sitting in other divisions of the same court.

A circuit court of the State of Missouri must take judicial notice of the state of the record and of all proceedings had before it in the same litigation. *Fears* v. *Riley*, 148 Mo. 49, l. c. 60, 49 S. W. 836.

In *Pelz* v. *Bollinger*, 180 Mo. 252 l. c. 262, the Supreme Court said that the circuit court "was bound to take judicial notice of all proceedings before it in the same litigation."

In *State ex Rel.* v. *Landwehr*, 332 Mo. 622, l. c. 628, 60 S. W., 4, the Supreme Court of Missouri, *en banc*, held:

> "Jurisdiction of circuit courts is fixed by law and not by rules or orders of the court. There is but one circuit court in the City of St. Louis, composed of eighteen parts called divisions. (Goddard to use of Hyde *v.* Delaney, 181 Mo. 564, 80 SW 886; In re Clark, 208 Mo. 121, 106 S. W. 990. There being but one circuit court necessarily there is but one jurisdiction. • • • each division of the court has all the jurisdiction of the court of which it is a part, unless otherwise provided by law."

And in *Case* v. *Smith*, 215 Mo. App. 621, l. c. 628, 257 S. W. 148, l. c. 150, the Kansas City Court of Appeals held:

> "The circuit court of Jackson county is one court, though it has different divisions, which are separate only to the extent that where a case has been assigned to and is pending in one division no other division has jurisdiction thereover, and cannot have, until the case has been duly transferred to such other division."

We appreciate that the denials of certiorari by this court in the cases involved in litigation by the Moffetts cited at the beginning of this point, do not have the conclusive effect of general judgments; but in view of the decision of this court cited under the first subdivision of this point, we submit that if the appellants can maintain the instant litigation, *res judicata* and *stare decisis* ceases to have meaning except for antiquarian research; and that if the law rightly can breathe life into the charred remains of the Moffett litigation to which we have referred, hereafter no one may be

> "called in question of the hope and resurrection of the dead" (Acts. 23:6).

VIII

Appellants' Assignment of Error No. 2 (See Appellants' Jurisdictional Statement, Page 8).

In Assignment No. 2 Appellants claim that the Supreme Court of Missouri, 193 S. W. 2d 588, violated Appellants' constitutional right by failing to give *res adjudicata* effect to its own decision *in re Moffett Brothers Partnership Estate*, 345 Mo. 741, that such refusal to follow its own decisions denied Appellants' their right under the Fourteenth Amendment.

No constitutional question was involved or decided in 345 Mo. 741. Indeed no constitutional question was decided

BLEED THROUGH– POOR COPY

by the Missouri Supreme Court in the instant case except the validity of Section 948, R. S. Mo. 1939. The case of *Moffett* v. *Moffett*, 345 Mo. 741, was not necessary to a decision in the instant case. Appellants erroneously contend otherwise and state that the Court held in that case that the Appellants therein could sue jointly there and therefore they could sue jointly here. The case, 345 Mo. 741, originated in the Probate Court of Jackson County, Missouri. Briefly, it was a claim for compensation as attorneys' fees rendered in the Moffett Estates. That was the only issue. The fees were allowed, appeal was had to the Circuit Court of Missouri and affirmed, and appeal was had to the Supreme Court of Missouri. The jurisdiction of the Supreme Court was derivative. There was only one question that was involved or could be involved. The Supreme Court of Missouri could not and did not enlarge its jurisdiction and consider other issues. On page 508 (137 S. W. 2d) the Court said:

> "The record covers nearly 1,400 pages and the briefs cover nearly 700 pages, and many alleged grounds are urged by appellant to support the contention that the judgment should be reversed, but the conclusion we have reached makes it unnecessary to consider but one of these grounds, viz., that under the facts claimant is not entitled to any fee from Moffett Brothers Estate • • • (512) The Judgment should be reversed and the cause remanded with directions to enter a judgment denying claimant any additional fees, but approving the payment of the $1,300.00, and it is so ordered."

In the opinion of Judge Clark in the instant case, 193 S. W. 2d, l. c. 592, the Court said:

> "In Re: Moffett Brothers etc., 345 Mo. 741 • • • grew out of an attorney fee allowed B. C. Howard for representing Commerce Trust Company as Admin-

> istrator of the partnership estate. Mrs. Moffett individually and as Executrix of her husband resisted the allowance in the Probate Court, Circuit Court, and Supreme Court. No point presented or decided as to Mrs. Moffett's right to appear in both capacities. The only point decided was that Howard was not entitled to an additional fee. 345 Mo. l. c. 745; 137 S. W. 2d l. c. 508. Some of the respondents in the instant case were not parties to that suit. Certainly the decision in that case is not res adjudicata as to the sufficiency of the petition in the instant case."

The Supreme Court of Missouri merely interpreted its own opinions which happened to be contrary to the interpretation of Appellants. Not having decided any constitutional question, this Court will not review the opinion of the Missouri Supreme Court. Assignment No. 2 is unsubstantial and has no foundation in fact or law.

In the *Howard Fee* case, 345 Mo. 741, l. c. 746, the court further said:

> "December 22, 1928, the trust company, proceeding under Section 86, Revised Statutes 1929 (Mo. Stat. Ann., sec. 86, p. 52), claims to have become administrator of Moffett Brothers estate in Missouri. It is contended by appellant that the trust company was not legally authorized to administer the Moffett Brothers estate, but, as stated, we shall consider only one question."

Appellants seek to invoke what the Missouri Supreme Court has called "the hitherto unheard of doctrine of judgment by implication." In *Duval* v. *Duval*, 316 Mo. 626, l. c. 635, it, through that distinguished and veteran jurist, Judge Robert F. Walker, spoke thus:

> "To contend in the face of the plain and unmistakable words of this opinion that it was intended to include things not expressed therein, but on the contrary, intentionally omitted therefrom, is to invoke the hitherto unheard of doctrine of judgment by implication."

BLEED THROUGH– POOR COPY

Furthermore, Howard's claim for fees originated in the Probate Court and was appealed to the Circuit Court and from thence to the Supreme Court. The jurisdiction of the Circuit and Supreme Courts, respectively, on appeal, being purely derivative, was confined exclusively to such jurisdiction as the Probate Court originally had. It could not be enlarged to any extent or in any particular by reason of the appeals. See *in re: Mills Estate,* 162 S. W. (2d) 807; *State ex Rel. Burns v. Woolfolk* ,303 Mo. 589.

Appellants filed in the Supreme Court of Missouri in the *Howard* fee case, a motion to tax costs therein, and the Court sustained said motion by an order in words and figures as follows:

> "And now the Court having seen and fully considered appellant's motion to tax cost, doth order that said motion be, and the same is hereby sustained in the sum of $979.05, said costs to be taxed against respondent B. C. Howard."

Thereafter, appellant Louise McGrew Moffett, filed in said Court a motion to modify the order, above-mentioned, taxing costs. Commerce Trust Company filed in the Supreme Court of Missouri written suggestions in opposition to the last mentioned motion. It is to be noted that in the aforesaid motion to modify the order taxing costs, the appellants stated:

> "That Commerce Trust Company has in its possession a sum in excess of ten thousand dollars ($10,000) belonging to Moffett Brothers Partnership Estate and that appellant Louise McGrew Moffett expended from her own funds the amount of the costs taxed against respondent B. C. Howard and that in appealing the said cause and defraying the expenses of the appeal said Louise McGrew Moffett was engaged in the performance of a duty which should have been performed by the respondent ,Commerce Trust Company in the

> capacity which it unlawfully assumed, to-wit: Administrator of Moffett Brothers Partnership Estate. See Harrington *v.* Evans, 49 Mo. App. 372. That for said reason the said Louise McGrew Moffett is entitled to be reimbursed by respondent commerce Trust Company individually or in any event out of the partnership assets from funds of that estate to justify her expenditures benefited."

and attempted to justify the taxation of costs against commerce Trust Company in its individual capacity on the above-recited grounds.

On may 7, 1940, said Court entered an order overruling said motion of appellants to modify the order taxing costs.

IX

In Appellants' First Assignment of Error (see also Page 7, Appellants' Jurisdictional Statement) it is claimed that the Supreme Court of Missouri, 193 S. W. 2d 588, denied Appellants their constitutional rights by holding that "the petition did not state a cause of action."

The opinion itself (l. c. 592) shows the contrary. The matter appealed from was the judgment of Judge Ridge, which, broadly speaking, held that there was a misjoinder of parties plaintiff. The opinion of the Missouri Supreme Court, after discussing Appellants' contentions and assignments of error, said (l. c. 592):

> "Appellants make many other assignments of error • • • None of these assignments is germane to the question of whether the Fifth Amended Petition contains a misjoinder of parties plaintiff or fails to state a joint cause of action. We hold the judgment is correct in form and in accordance with law, and it is therefore affirmed."

BLEED THROUGH– POOR COPY

In the opinion, 193 S. W. 2d 588, l. c. 591, the Supreme Court expressly stated:

> "The petition fails to state a joint cause of action and it was unnecessary for the trial court and is unnecessary for this court to determine whether a cause of action is stated in favor of Mrs. Moffett in either capacity. Rockwood *v.* Crown Laundry Co., 352 Mo. 561, 178 S. W. 2d 440, loc. cit. 443; Doerr-Engel *v.* Tide Water Oil Co., 342 Mo. 1141, 119 S. W. 2d 402; Neiderberg *v.* Golluber, Mo. Sup., 162 S. W. 2d 592, loc. cit. 599. Judge Ridge sustained the demurrers on the sole ground of misjoinder of parties, but the demurrers also attacked the petition for misjoinder of alleged causes of action and for failure to state a cause of action. We think the reason assigned by the trial court is sufficient."

All of these cases clearly support the pronouncements of the Court.

Other than the validity of Section 948, R. S. Mo. 1939, the Supreme Court of Missouri passed on no constitutional question. This Court will not review the decisions of the Supreme Court of Missouri touching issues upon which that Court did not pass.

We might rest this point here, but, in order to demonstrate the unsoundness of Appellants' Assignment No. 1, may we suggest that the separate demurrers to Appellants' Third Amended Petition and also to their Fifth Amended Petition admitted only the well-pleaded facts therein. They did not admit Appellants conclusions of law and fact. The Appellants' claim that said demurrers admitted that Judge Hay was corrupt is refuted by the petitions themselves and by the specific declaration therein. The Third Amended Petition disclaims that the words "corrupt" or "corruption" were used therein relative to Judge Hay (Appellants' Abstract, 299-300). Appellants' Jurisdic-

tional Statement also disclaims it (Page 43), in which the following improperly appears:

> "Appellees have admitted that the acts of the Kansas State District Judge, which they twice admitted to be true (once in their demurrer to the Third Amended Petition and once in their demurrer to the Fifth Amended Petition), were acts of a corrupt judge (299). Appellants had not used that language."

We feel it fair to this Court and to justice to state there is nothing in the record that justifies the Appellants' charge that Appellees in any manner, in any place, ever admitted that the acts of Judge Hay were corrupt. On the very contrary, this record shows from beginning to end that the exact opposite is true. Both of said Third and Fifth Amended Petitions, touching the charge of fraud and corruption as related to Judge Hay, were nebulous, uncertain, and reached no higher point than innuendoes. Under such charges the demurrers did not admit Plaintiffs' present contention that Judge Hay was corrupt. In order to make a valid charge of fraud or corruption facts must be pleaded from which fraud must necessarily be implied.

In *Weitzman* v. *Weitzman*, 156 S. W. 2d l. c. 908, the Supreme Court of Missouri said:

> "Considering as true the ultimate facts pleaded, we find them insufficient to state a cause of action in fraud. *To state a good cause of action in fraud sufficient facts must be pleaded from which fraud must necessarily be implied.*
>
> "The ultimate facts pleaded and not the conclusions of the pleader control. The rule is well stated in 27 C. J. 31, Sec. 147:
>
> "'A declaration or other pleading setting up fraud as a basis of recovery of damages must clearly and distinctly allege all of the essential elements of action-

BLEED THROUGH– POOR COPY

able fraud * * * A characterization of acts as fraudulent which are not fraudulent per se is not sufficient. It must be made to appear by the facts alleged, independent of mere conclusions, that if the allegations are true a fraud has been committed.' * * *

"Fraud is never presumed, but must be proved by clear and convincing evidence, and he who charges fraud has the burden of so proving it."

In the case of *Sabin* v. *Home Owners Loan Corporation*, 151 F. (2d) 541, the United States Circuit Court of Appeals for the Tenth Circuit, in affirming a summary judgment for the defendants, said, l. c. 542:

"Flimsy or transparent charges or allegations are insufficient to state a justiciable controversy requiring the submission thereof for trial. * * * The statement that the trial court was overreached is a mere conclusion and not a statement of fact. This assignment of error does not merit any serious consideration or extended discussion. It is sufficient to say that the manner in which the foreclosure action was tried by the trial judge was the issue in the appeal to the Oklahoma Supreme Court. All the questions now urged as to the admission of evidence or other rulings of the trial court were urged then. The Supreme Court found no error in the manner in which the trial was conducted, and found that it had been in all respects in conformity with the law of the State."

This case parallels the instant case. An application for writ of certiorari was denied by this Court on May 7th, 1946, being Cause No. 952.

In *Kithcart* v. *Ins. Co.*, 88 F. (2d) l. c. 410, Judge Gardner, speaking for the Eighth Circuit, said:

"On motion to dismiss, all well-pleaded facts, but not conclusions, are admitted.

"It may be gathered from the allegations of the bill that it was the claim of plaintiff that through the

fraudulent acts of defendant, he was prevented from producing certain testimony * * * Just what evidence plaintiff was prevented from producing is not made clear. Neither is it clear what acts were committed * * * which it is claimed constituted fraud * * * It is elementary that a bill of complaint charging fraud must set out with some degree of particularity the material facts claimed to constitute the fraud (citing authorities)."

The Court will note that Appellants' Third Amended Petition consisted of 73 pages and was filed September 21st, 1943 (Appellants' Abstract, 62-135); that Appellants' Fifth Amended Petition, consisting of 200 pages (Appellants' Abstract, 154-354) was filed November 1st, 1944, several years after all of the Moffett litigation had been decided adversely to them in the various jurisdictions. For instance, *Moffett etc.* v. *Moffett etc.*, 131 Kans. 582 affirmed the judgment of Judge Hay November 8th, 1930; *Clark etc.* v. *Moffett etc.*, 136 Kans. 711, affirmed Judge Hay on January 28th, 1933; and thereafter certiorari was denied by this Court, 290 U. S. 602, 290 U. S. 642. The United States District Court for the State of Kansas in *Moffett etc.* v. *Robbins etc.*, 14 Fed Sup. 602, sustained Judge Hay on September 4th, 1935. The United States Circuit Court of Appeals in *Moffett etc.* v. *Robbins etc.*, 81 F. (2d) 421, sustained Judge Hay January 15th, 1936, and thereafter this Court denied writ of certiorari, 298 U. S. 675.

Your Honors will note that Appellants' Assignment No. 1 is an effort to undo all of this litigation on the baseless charge that the demurrer to the Third Amended Petition filed in 1943 admitted that Judge Hay was corrupt concerning a petition that shows on its face that such charge of "corruption" was not made, but, on the contrary, denied.

BLEED THROUGH– POOR COPY

If Appellants plead that a demurrer admits the corruption of a trial judge and the same pleading denies that corruption was charged, then there is a conflict, which, of course, precludes the claim that the demurrer admits such a charge. In *State ex rel.* v. *Horner*, 187 S. W. 2d 976 (Mo. App.) Syllabus 3 reflects the opinion of the Court, and is as follows:

> "Conflicting allegations are not admitted by a demurrer."

We are endeavoring to save time and space but beg to add one more case. In *Amber* v. *Choteau*, 107 U. S. 586, 591, the Court held that the words "fraud" and "conspiracy" alone, no matter how often repeated in a pleading, can not make a case for the interference of a court of equity. They have no more effect than other words of the same unpleasant signification. This principle was well *stated in Losch* v. *Pickett*, 36 Kans. l. c. 222, where it was said:

> "A plaintiff should in all cases be bound by his allegations deliberately made • • • A party to an action should not be allowed to obtain benefits from contradictory and inconsistent allegations deliberately made in his pleadings • • • The spirit of our civil code is that a party shall state in his pleadings the real facts of his case and not falsehoods or fictions • • • A thing can not be true and untrue at the same time, and any pleading containing allegations made by the same party both affirming and denying a particular thing carries falsehood on its face."

This Court will note that the demurrer complained of was lodged against the Third Amended Petition and not against the Fifth Amended Petition (the instant petition) consisting of 200 pages and filed more than a year later.

We think that it is our duty while we are on the point of the integrity of Judge Hay, which is being assaulted,

that we give you the appraisal of the Supreme Court of Kansas. In *Moffett etc.* v. *Moffett etc.*, 136 Kans. l. c. 724, the Supreme Court of Kansas said:

> "Perhaps because of it many contentions were made which were not well founded. Some tactics were indulged in, the obvious purpose of which was to impede, rather than to aid, the orderly administration of justice. With this attitude prevalent, it is fortunate that the trial was before an able and experienced trial judge who could winnow the wheat from the chaff. While doing so, the court gave the parties ample time for trial and a fair opportunity in the introduction of evidence. The judgment is fully sustained by the evidence, and, as we view it, in its main features, at least, is the only one which properly could have been reached from the evidence."

All of the allegations of forgery, criminal conspiracy, fraud, etc., charged against the Appellees may properly be reduced to a single point, to-wit: Exhibit 8 in the Harper County partition-accounting suit tried by Judge Hay. That Exhibit was an exposition of the condition of the Moffett books, which was the basis of the litigation. When Your Honors examine the Abstract of the Record in your Court in *Clark etc.* v. *Moffett etc.*, 136 Kans. 711, 290 U. S. 642, 290 U. S. 602, Cause No. 181 in your Court, you will find Appellants' Request No. 13 for Judge Hay to modify a finding of fact (Appellants' Abstract, 24), which request shows that they asked Judge Hay to find that the Moffett Brothers books, of which they now so bitterly complain, were considered by all parties as reasonably reliable and dependable and were accepted by all parties as correct. Their Request is as follows:

> "The partnership books as set up on January 1, 1924, continuously remained in the possession of John Moffett and Thomas S. Moffett, partners, until the

BLEED THROUGH- POOR COPY

date of the death of said John Moffett, and that after the death of John Moffett, Thomas S. Moffett had possession of all the books, papers and documents belonging to the partnership of Moffett Brothers until the date of his death, at which time the possession of said books and documents passed to the possession of Louise McGrew Moffett (as Executrix of the Estate of Thomas S. Moffett, Deceased) who has since continuously kept possession of all the books, papers and documents belonging to the partnership of Moffett Brothers and the said Louise McGrew Moffett (as such Executrix is now in the possession of the same • • • These books (excepting the books known as the ledger and journal of Moffett Brothers and Andrews) while they may not have been artfully and scientifically kept were in the main substantially correct and up to the time of the death of John Moffett they were regarded by all the parties whose accounts were kept therein as reasonably reliable and dependable. After the accountants set up the new books their report was fully considered by both partners, John Moffett and Thomas S. Moffett, and it does not appear that either one of them ever made any objections or complaints in regard to the books or in regard to the entries made therein, possibly with the exception of the item concerning the Guss transaction hereinafter mentioned."

Just one more word. Judge Wright sustained all of the separate demurrers to the Third Amended Petition. There was no appeal. Appellants pleaded over by filing a Fourth Amended Petition, and thereafter a Fifth Amended Petition. Judge Wright's opinion is final and conclusive, and left no issue for the Supreme Court of Missouri to pass on. Touching this exact point the opinion of the Supreme Court of Missouri in *Moffett* v. *Commerce Trust Company*, 193 S. W. 2d 588, l. c. 591, says:

"The correctness of the rulings on former petitions was not before Judge Ridge and, although previous

petitions are printed in the abstract, the question is not before us. By pleading over appellants waived the error, if there was such. Voorhees *v.* Louisiana Purchase Co., 243 Mo. 418, 147 S. W. 783; Tobin *v.* Bell Telephone Co., Mo. Sup., 199 S. W. 952; Buder *v.* Reller, Mo. Sup., 190 S. W. 2d 213."

Appellants contend that the alleged statements of the Weede counsel in her brief relating to the third amended petition (which was sustained by Judge Wright and which is not before this Court for review) amounted to a judicial admission that Judge Hay was corrupt. They admit that said statements were not made in open court but appear only in a brief. Therefore, if true, it did not constitute a judicial admission as defined by the courts.

In *Beattie Mfg. Co.* v. *Gerrardi*, 214 S. W. 189 (Mo. Sup. Ct.) the Court said: (l. c. 192)

> "It is next insisted by appellant that plaintiff's counsel, when the trial was nearing a close, admitted that the plaintiffs were foreign executrices, and by so doing admitted himself out of court, so to speak. To have the effect claimed for it, such admission must have belonged to the class termed 'judicial admissions.' It must therefore have been deliberately made for the purpose of being used as a substitute for the regular legal evidence of the fact at the trial (1 Greenleaf on Ev. Par. 205), for not every statement made by counsel casually, or in the heat of argument, or in colloquy with his adversary, is binding on his client (1 Enc. Ev. 467). • • • • •
> That respondents' counsel was at all times during the trial keenly alive to the legal situation is unquestioned. The record shows that up to the time of this conference at least he was vigilantly on guard and successfully parried all efforts of appellant's counsel to get this same matter into the record. It is evident therefore that the alleged admission was not made upon such circumstances as to be binding upon the respondent."

BLEED THROUGH– POOR COPY

In *Pitcairn* v. *American Refrigerator Transit Co. et al.*, 101 Fed. 2d 929 (C. C. A. 8) the court said: (l. c. 935)

"It is pointed out by the Wabash that at the conclusion of all the evidence, a motion was made by each defendant severally to dismiss the cause upon many grounds, among others that upon the undisputed evidence in the case, plaintiff was not entitled to an accounting upon the contract 'which the evidence shows was cancelled May 1, 1917, or fourteen years before the date of the filing of the second amended petition.' It is observed that this occurred at the conclusion of the taking of all the evidence. Manifestly, this action has in it no element of estoppel. It did not mislead the Wabash into any action taken, as the motion was made long after the acts which fixed the rights of the parties had taken place. It was not the admission of a fact by pleading or stipulation, but rather a legal conclusion based on the record made, and the admission of a legal conclusion is not binding on either the trial or appellate court, nor on the party by whom made. People *v.* Pittsburg R. Co., 244 Ill. 166, 91 N. E. 48; Bradway *v.* Miller 200 Mich. 648, 167 N. W. 15; Rousseau *v.* Brotherhood of American Yeomen, Mich., 139 N. W. 2; Auburn City Club *v.* McGeer, 198 N. Y. 160, 91 N. E. 539."

X

Comanche Case. Helen Moffett v. T. S. Moffett, et al., 131 Kan. 546; same, 283 U. S. 826.

One of the alleged causes of action pleaded in the Fifth Amended Petition appears in Paragraph 44 thereof (Appellants' Abstract, 319-321). In this paragraph Appellants charge that on July 14th, 1928, Appellee Weede (then Moffett) instituted a suit in the District Court of Comanche County, Kansas (Carl Miller, District Judge) to reform certain deeds by striking therefrom the name of Thomas S. Moffett. The petition charged that this was "the first open

attack of a series of attacks made by Appellees." The petition charges that the case was tried before Judge Miller in June, 1929. At the trial all parties were present and also represented by counsel. The petition charges that Appellee Weede, through her counsel, excused a witness so that he was not available to Defendant Thomas S. Moffett and by reason thereof said Thomas S. Moffett was "unable to offer said applications in evidence in said suit at the trial • • • that said Defendant Weede thus prevented said Thomas S. Moffett from offering said applications, and practiced a fraud on the court • • • that said fraud prevented a fair trial and was collateral and extrinsic to the issues • • • and resulted in a judgment against Thomas S. Moffett and deprived said Thomas S. Moffett and this Plaintiff of 1,127 acres of the most valuable land in Comanche County."

To state it more briefly, Appellants charge that by excusing a witness the Defendants in that case were prevented from identifying certain documents described in the petition (Appellants' Abstract, 320) which resulted in an adverse verdict, and that said alleged fraud was extrinsic and therefore the judgment was void. The petition does not claim that Appellants notified the court of the alleged excusing of the witness, nor did defendants ask for legal process to bring the witness into court, nor did they ask for a continuance until said witness could be procured. The petition shows that the defendants in that case went on with the trial and the trial judge (J. Carl Miller), after hearing from all parties, rendered a judgment in favor of Helen Moffett (then Helen Weede). The petition shows on its face that the alleged excusing of a witness (even if true) did not constitute extrinsic fraud and therefore did not render the judgment void. Defendant and his counsel knew as much about the alleged absence of the witness in

BLEED THROUGH– POOR COPY

June, 1928—the time of the trial—as they did when they filed this petition for damages in December, 1941. Appellants' Fifth Amended Petition failed to note that the judgment of Carl Miller was affirmed by the Supreme Court of Kansas on November 8th, 1930 (*Moffett* v. *Moffett*, 131 Kan. 546). It also failed to note that the Supreme Court of the United States denied a petition for a writ of error in said case on March 9th, 1931, 288 U. S. 826.

A significant hiatus existed between March 9th, 1931, and December, 1941, when Appellants filed their Fifth Amended Petition for damages.

The certiorari case just referred to is entitled:

"In the Supreme Court of the United States

October Term 1930

"Petition for Writ of Certiorari to the Supreme Court of the State of Kansas, and Brief in Support Thereof

"Filed February 2, 1931

No. 700

"Messrs. A. E. Watson and Martin J. O'Donnell for Petitioners."

The attorneys in the instant case were the same attorneys who tried the case before Judge Carl Miller in the District Court of Comanche County, and also before the Supreme Court of Kansas, 131 Kan. 546. On Page 547 the opinion sets out fully the findings of fact and conclusions of law of the trial judge. The opinion shows that the name of Thomas Moffett was stricken out of the deed. The opinion shows no complaint made in that court of the alleged excusing of a witness at the trial, or that the Defendants in that case were prevented from introducing the documents complained of on Page 320 of their petition.

For the purpose of demonstrating to the Supreme Court of the United States that the charge made on Page 320 that they were prevented from introducing certain documents at the trial of the case in the District Court of Comanche County, Kansas, by the alleged fraud of Appellees, we ask Your Honors to read Pages 5, 6 and 7 of the petition in Case No. 700—283 U. S. 826, being the case wherein Appellants' petition for writ of certiorari was denied. These pages of Appellants' record in that case completely annul and invalidate their petition and show that the exact documents complained of in their petition had been introduced in evidence by them at the trial of the case in Comanche County, Kansas.

We might extend this presentation by quoting from Appellants' record in Case No. 700, but inasmuch as that record is before Your Honors for examination we will content ourselves by repeating that the identical documents which they say they were prevented from introducing at the trial, appear in the aforesaid petition and record in this Court, and said documents were introduced by them and were before the court at the time Judge Carl Miller decided the case.

Plus this: The opinion of the Supreme Court of Missouri in the instant case, 193 S. W. 2d 588, passed upon but one issue, viz.: that Plaintiffs' Fifth Amended Petition contained a misjoinder of parties plaintiff and failed to state a joint cause of action. This Court will not review the opinion of the Supreme Court of Missouri on issues undecided by it. This assignment of error has no justification in law.

Said Comanche County case was tried during the lifetime of Thomas Moffett. There is nothing in the petition or in any record to show that any of the Appellees had any interest in the case. Appellants' charge that the suit men-

BLEED THROUGH- POOR COPY

tioned in said paragraph 44 (Appellants' Abstract, 320) was the first shot in this alleged conspiracy missed the mark.

XI

Jurisdiction is not vested in this Court by reason of Appellants' charge that Appellee instituted and maintained fictitious suits in the State courts, alleged to be pursuant to an unlawful conspiracy. (Appellants' Assignment of Error No. 26. Appellants' Jurisdictional Statement, Page 36.)

There has been a successful outcome against Appellants in all the cases which have been tried. The cases which have been tried, therefore, have been proven not to be fictitious but meritorious.

The fourteen alleged fictitious suits were all pending at the time this petition was filed, although three of them have since been dismissed. Such pending suits therefore could not be the basis for a recovery in this Court.

The law of Missouri is stated by the St. Louis Court of Appeals in the case of *Lindsay* v. *Evans*, 174 S. W. (2d) 390, as follows: (l. c. 395)

> "There is no doubt that among the necessary elements of a cause of action for a malicious prosecution is the requirement that the prior proceeding which is counted upon as the basis for the action shall have terminated in favor of the plaintiff in the malicious prosecution action. Higgins *v.* Knickmeyer-Fleer Realty & Investment Co., 335 Mo. 1010, 77 S. W. (2d) 805. Otherwise the plaintiff might be permitted to recover for the bringing of an action against him which the court entertaining such action might subsequently find to have been well brought, to say nothing of the fact that until he is able to show that the action against him was unsuccessful, he can show no damage for which he might recover. Moreover, a suit which is prematurely brought not be maintained, even though the

cause of action has perchance accrued by the time the case is called for trial; nor may an amended petition in such a case set up a cause of action which had not accrued at the time the original petition was filed. Jegglin *v.* Orr, 224 Mo. App. 773, 29 S. W. 2d 721."

The rule in Missouri that an action for a malicious prosecution may not be maintained until it is shown the previous action has been finally terminated in plaintiff's favor is well settled. See *Weber* v. *Strobel,* Mo. Sup., 225 S. W. 925, 927, *Kvasnicka* v. *Montgomery Ward & Co.,* 350 Mo. 360, 166 S. W. (2d) 503, 504.

Appellants have a complete remedy in the state court. Under the state law and practice they can force trials of these cases or their dismissal for failure of the plaintiff to prosecute with due diligence. See *Guhlman* v. *Growthe,* 346 Mo. 427, 142 S. W. S. W. (2d) 1, 2.

Furthermore it should be noted that by reason of the disposition adverse to Appellants of many of these alleged fictitious suits, there are only a few remaining to be tried, one of which is the case of Commerce Trust Company, Administrator of the partnership of *Moffett Brothers* v. *L. B. Andrews, J. C. Lewis, and T. S. Moffett,* No. 339, 134, referred to on Pages 297 and 298 of the petition, where it is alleged in effect that appellants, at the May Term 1944, in an attempt to minimize the damages still being suffered by plaintiff by reason of said fictitious and vexatious litigation aforementioned, presented a duly verified motion to dismiss said cause No. 339, 134, and called attention to the other vexatious and fictitious suits still pending, and that the Judge of said court "erroneously overruled said motion to dismiss and permitted said defendants to still continue said fictitious and vexatious suits on the docket of this court." The records in the Harper County case show that the subject matter of three of said claims, to-wit, the claim of John Moffett's estate against Moffett Brothers,

BLEED THROUGH- POOR COPY

the claim of Moffett Brothers against Thomas S. Moffett, and the claim of Moffett Brothers against Moffett Cattle, Land and Lumber Company, were disposed of adversely to the contentions of appellants.

Furthermore, the complaints as to the fictitious suits do not, we believe raise any federal question. In the case of *Thomson* v. *Butler*, 8 Cir., 136 F. (2d) 644, the court said: (l. c. 647)

> "We must hold, also, that the trial court was correct in declaring that it had no jurisdiction of plaintiffs' suit on the basis of a federal question being involved. Whether the will forgery and the perjury and other fraud, claimed to have been perpetrated by the proponents in the state court proceeding, would, if established, constitute sufficient grounds for annulling a judgment generally, in equity, there is no occasion for us to consider, because even if they could, they present no question here arising under the Constitution of the United States as plaintiffs contend. • • • There is no violation of the Fourteenth Amendment in litigation merely because the result is erroneous or unjust, or has been achieved by improper tactics on the part of one of the litigants, where the State's judicial processes are such as, on the basis of recognized principles, afforded the parties a fair opportunity for hearing and determination by the Court. Worcester Co. *v.* Riley, 302 U. S. 292, 58 S. Ct. 185, 82 L. Ed. 268; Central Land Co. of W. Va. *v.* Laidley, 159 U. S. 103, 16 S. Ct. 80, 40 L. Ed. 91; Fayerweather *v.* Rich, 2 Cir., 9 F. 721".

Furthermore, Judicial Code, Section 237 as amended, 28 U. S. C. A., Section 344, limits the right of appeal to this Court from the state courts to "a final judgment or decree in any suit in the highest court of a state." Obviously the pending litigation in state courts of first instance affords no Federal jurisdiction, violates no Federal right, and, we submit, is entitled to no consideration here.

XII

Appellants are completely in error in the contention that there is a right of action for conspiracy alone, independent of the damage caused by specific acts in furtherance of the conspiracy, either under the Statutes of the United States or of the State of Missouri. The "mere force of numbers" doctrine can have no application in the instant case. (Appellants' Assignment of Errors, Nos. 10, 11, 12, 13, 18, 26 and 31.)

Appellants, in order to escape the effect of the final judgments in previous Moffett litigation, upon which certiorari was denied by this court and to which we herein have directed its attention, apparently are contending that although in such litigation it was adjudged they were not wronged by the most important acts of which they complain, nevertheless they have a right of action based solely upon conspiracy, which cannot be barred by any adjudication that any or all of the specific acts of which they complain have done them no wrong. In this they are completely in error.

Of Sections 43, 47 and 48 Title 8, U. S. C., only Section 47 deals directly with conspiracy; and the recovery therein is specifically conditioned that

> "*If* one or more persons engaged therein *do or cause to be done, any act* in furtherance of the object of such conspiracy, *whereby another is injured* in his person or property, * * *" (emphasis added)

Sec. 48 id. gives a right of action against those having knowledge of any of the "*wrongs* conspired to be done," in favor of a party injured "for all damages caused by such wrongful act" which such person by reasonable diligence could prevent; and it is interesting to note that if

BLEED THROUGH- POOR COPY

the wrongful act caused death, the *legal representatives* of the deceased may recover *for the benefit of his widow.*" (emphasis added)

By reference to *O'Sullivan* v. *Felix*, 233 U. S. 318, l.c. 323, 325, 58 L. ed. 980, wherein this court affirming a dismissal of a civil rights damage suit on a plea of limitation, it is evident this court was clearly of the opinion that the right of action arose from the acts done pursuant to conspiracy and that the action could not be grounded on the conspiracy alone.

The last cited decision also construes Title 18 Sec. 51 U. S. C. as basing the right of action on the damage caused by the overt acts pursuant to the conspiracy and not on the conspiracy itself.

In *Mitchell* v. *Greenough*, 100 Fed. 2 184, rehearing denied id., 1006, certiorari denied 306 U. S. 659, 83 L. ed. 1056, the court construed the applicable provisions of Title 8 Sec. 47 U. S. C. as prohibiting the denial of equal protection for the purpose of preventing class legislation or action.

Title 18 Sec. 52 U. S. C. is a criminal statute, not covering conspiracy and the only pertinent decision as to civil liability thereunder which we find is *Brawner* v. *Irvin*, 169 Fed. 964, holding that Sec. 52 id., is a penal statute and that its infringement does not ground a civil action for damages.

Section 4633 R. S. Mo. 1939 is like Section 47 of Title 8, U. S. C. in making conspiracies with exceptions not here material, non-actionable in the absence of overt acts pursuant to the conspiracy. It reads:

> "Sec. 4633. What shall constitute conspiracy in certain cases. No agreement, except to commit a felony upon the person of another, or to commit arson or burglary, shall be deemed a conspiracy unless some act

besides such agreement be done to effect the object thereof, by one or more of the parties to such agreement."

In *State* v. *Dalton*, 134 Mo. App. 517, Judge Nortoni speaks of the modification of the common law of conspiracy by our "present statutory provisions requiring the commission of an overt act in certain cases," which refers to the last quoted statute.

Appellants cite *State* v. *Bacon*, 61 Atl. 653. In that case the discussion in the opinion on the law involved is based entirely upon the common law unmodified by our statutes referred to by Judge Nortoni, since the Supreme Court of Rhode Island definitely says:

> "Conspiracy is not a statutory crime or misdemeanor in Rhode Island * * * The common law offense cannot be enlarged by legislation and the only effect that statutory interpretation can have upon it must be to restrict or abridge it."

State v. *Bacon* was a criminal case, dealing with the criminal offense as it existed at common law. It is to be noted that the court holds that the only effect of statutes is to restrict or abridge the common law offense.

Appellants here rely on the "mere force of numbers" doctrine as referred to in *Shaltupsky* v. *Brown Shoe Co.*, 350 Mo. 831, 168 SW 2 1083, and *Baucke* v. *Adams* (Mo. App.) 188 SW 2 355, l.c. 366.

In the *Shaltupsky* case the court refused to apply the mere force of numbers doctrine holding that:

> "The alleged conspiracy charged was at most merely that the bank and Shoe Company each would do what each could do separately and what each, acting alone, could do without regard to motive or purpose in so doing."

BLEED THROUGH– POOR COPY

The word "mere" means "such (as is mentioned) and no more; nothing but; • • • unaided. • • • Pure; unmixed." In re *Plymouth Motor Corp.* 46 Fed. 2 l. c. 212. In other words, it is force of numbers alone, and not the individual reputation, power or prestige of certain individuals which is to be taken into consideration in appraising the power to do injury of the mass or mob. For instance, Commerce Trust Company, in proceeding after the death of John Moffett, and as personal representative of his estate, to collect the debts owing to that estate from Moffett Brothers' partnership, and in bringing a number of suits designated by appellants as "fictitious" was acting alone and nothing that the other appellees did or could have done in that connection could not have added to the nature or extent of the alleged injury. The appellants in the petition have laid emphasis upon the standing and resources of certain of the appellees. Those "soft impeachments" would add nothing to the force of a group in which the particular appellee was one, and "mere force of numbers" in itself implies the physical coercion of a group and does not pertain to the peculiar characteristics of individuals thereof.

XIII

Appellant's Charge of Libel

(300-304, Appellant's Abstract). This point does not seem to appear in Appellant's Assignment of Errors, but is presented in Section 22, Page 17, and Section 25, Pages 18-20 of Appellant's Motion for Rehearing, or, in the alternative, to transfer the instant case from Division No. One to Court En Banc of the Supreme Court of Missouri, which they seek to make a part of their jurisdictional statement.

The Petition shows on its face that this claim for damages was first presented in Appellant's fifth amended petition,

and claims damages for alleged offenses occurring during the trial of said cause. The Petition shows on its face that Appellants sued for damages in both capacities, and there was, therefore, a misjoinder of parties of plaintiff.

Time will not permit an extended presentation, but, broadly speaking, Appellant's Petition charged (301-304) that:

> "Appellees committed additional overt acts pursuant to the alleged conspiracy, with the design of destroying the standing of the plaintiff and her counsel in the community, which wilfully, deliberately, premeditately, maliciously, without just cause • • • and under all circumstances showing that they did so regardless of social duty and flatly bent on mischief, published of and concerning plaintiff in both capacities the following false, malicious, scandalous, defamatory, unprivileged and libelous statements charging plaintiff with guilt of said charges in every capacity • • • (322, 323). That her reputation for integrity has been injured by said libelous and defamatory statements and by said wrongful acts of the defendants pursuant to the conspiracy thereby alleged, resulting in actual damage to plaintiff in the sum of One Million Dollars."

And then the Petition asks for an additional One Million Five Hundred Thousand Dollars damages.

It will be noted that the claim for damages, both punitive and actual, had been increased by reason of the foregoing charges, One Million Dollars since the third amended petition was filed. Touching this point, the Supreme Court of Missouri in 193 S. W. (2d) L. C. 591, said:

> "Some of the acts complained of are alleged to have been performed long after Mr. Moffett's death and after the institution of the suit. Among other things it is alleged that some of the respondents, in briefs filed in the case 'published of and concerning plaintiff

BLEED THROUGH— POOR COPY

in both capacities the following false, malicious, scandalous, defamatory, unprivileged and libelous statements * * *

Then, in the Prayer, is stated that:

"Her reputation for integrity has been injured by said libelous and defamatory statements and by said wrongful acts * * * resulting in actual damage to plaintiff in the sum of One Million Dollars.'

The Prayer also is for punitive damages in the sum of One Million Five Hundred Thousand Dollars."

The Opinion then held, broadly speaking, that no joint cause of action is stated and that such defects appearing on the face of the Petition under the old Code could be reached by a demurrer.

Again, the Court said, in substance, the petition fails to state a joint cause of action, and it was unnecessary for the trial court and is unnecessary for this court to determine whether a cause of action is stated in favor of Appellants in either capacity.

When it became apparent that this portion of the Petition was demurrable for misjoinder of parties plaintiff, Appellants abandoned their claim for One Million Dollars damages on account of the libel and, speaking broadly, began to press their claim for damages for conspiracy.

It is stated elsewhere in this brief that the gist of an action for damages caused by conspiracy is the injury done and not the conspiracy alone. It is the judgment and not the alleged conspiracy through which a judgment was obtained that causes the damage.

Your Honors will note what we have heretofore said repeatedly, that the Supreme Court of Missouri did not pass on a Constitutional question relating to said charge of

libel. There was no Constitutional question involved, and the decision of the Court was wholly unrelated to said charge of libel.

In Section 22, Page 17, of Appellant's said Motion for Rehearing, they state:

> "This Court inadvertently overlooked the allegation of the fifth amended petition, disclosing that the false charges against appellant and her counsel were filed with the Judge of Division One (Judge Wright), (299, 301, 305), and that preparations and filing of these documents were, and were alleged to be (301) • • • additional overt acts pursuant to said conspiracy, etc."

This Court will note that this charge of libel is alleged to have been made in the brief filed in Division One (Wright's division of the Circuit Court) and not against the instant petition, but against the third amended petition. It is shown that Judge Wright sustained the demurrer, and that appellants, instead of appealing therefrom, filed their fourth, and then their fifth amended petition. We repeat that the judgment of Judge Wright, not having been appealed from, was final and conclusive. Not having been appealed from, it presented no question to the Supreme Court of Missouri, and it follows that the Supreme Court of Missouri, not having passed on the point, that question is not presented to this Court for review.

To emphasize the point, we quote from the opinion of the Supreme Court of Missouri, 193 S. W. (2d) 583, l. c. 591:

> "The correctness of the rulings on former petitions was not before Judge Ridge and • • • the question is not before us. By pleading over, appellants waive the error, if there was such. Voorhees *v.* Cole, 243, Mo., 418, 147 S. W., 783. Tobin *v.* Bell Telephone Co., Mo. Sup. 199, S. W. 952. Buder *v.* Weller, Mo. Sup. 190 S. W. (2d), 213.

BLEED THROUGH– POOR COPY

Appellant's petition further charges (306-307) that:

> "Said defendants by said false and defamatory statements, and by their representation to the Judge of said Division Number One (Wright's Division), that said Kansas judgments and opinions truthfully recited the jurisdictional facts on which they purported to be based, and that said judgments were therefore valid, and by concealing from said Judge the true facts, which were shown by the records aforesaid of said Courts, not to justify said judgments or opinions, but to deprive said Kansas courts of jurisdiction to render same, perpetrated a fraud on this Court then sitting in Division One thereof in the very act of obtaining said decision on said demurrers, and thus fraudulently caused said innocent and unsuspecting Judge to sustain them and to cause further delay * * * defendants further perpetrated a fraud on this Court sitting in Division One thereof by representing to it that said Kansas judgments were valid * * * and thereby caused said Judge in Division One to give full faith and credit to said void Kansas judgments when sustaining said separate demurrers, though said judgments were not before said Division One for decision, etc."

Your Honors will please note that the various decisions which appellants claim that we fraudulently pressed upon the Court, and deceived him into rendering a void judgment, were the same decisions we have heretofore cited over and over again, and to which, for identification, we will give the mere citation, viz.: 136 Kans. 711; 290 U. S., 602; 290 U. S. 642; 131 Kans. 582; 131 Kans. 546; 283 U. S. 826; 14 Fed. Sup., 602; 81 Fed. (2d), 431; 298 U. S. 675.

Elsewhere we have attempted to point out to Your Honors the fact that these decisions are final and approximately all of the questions presented by the instant appeal have been therein determined, and these cases are now before this Court for such use as you care to make of them.

XIV

Appellants complain that the opinion of the Supreme Court of Missouri, 193 S. W. 7, 588, denied Appellants their constitutional rights by giving validity to the acts of which we will hereafter denominate as de facto judges. Appellants claim that those judges were illegally appointed and their acts are void.

Broadly speaking, the record shows that appellants participated in, and without any objection, to the various acts of the special judges of the Probate Court of Jackson County, Missouri, without objection. At the outset appellees assert that the Supreme Court of Missouri did not pass upon the validity of the acts of said special judges, nor was it necessary to pass upon that issue in deciding the case. Therefore, that question is not before your Honors for review. We might rest this point upon the above statement, but we will briefly add that the acts of said special judges have been approved by all of the courts of Kansas and Missouri in which that question has arisen.

In *Moffett* v. *Moffett et al.*, 131 Kans. 582, 292 P. 947, the Court said, 582, "The Commerce Trust Company * * * having been previously duly appointed executor *de bonis non* of the will of John Moffett, deceased, and also administrator of the partnership estate of Moffett Brothers, in its two respective capacities * * *, 588, appellant contends that The Commerce Trust Company is intervening in two capacities which are in conflict, but we think there is no such conflict as would make it difficult for the trial court to ascertain and adjust the respective rights of the parties. On the whole it seems quite clear that there should be such an accounting as is prayed * * *."

Again in *Clark* v. *Moffett*, 136 Kans. 711, 292 P. 555, the Court took exactly the same attitude and made the same

BLEED THROUGH– POOR COPY

holding. This Court denied appellants petition for writ of certiorari in that case, 190 U. S. 602, 290 U. S. 642. Therefore, that case is before your Honors for examination.

The acts of a *de facto* judge of the Probate Court are as valid and binding as the acts of a *de jure* judge, and such acts cannot be attacked collaterally. In *State* v. *Douglas*, 50 Mo. l.c. 586, the Court said:

> "Nothing is better settled than the acts of an officer *de facto* (although his title may be bad), they are valid so far as they concern the public or the rights of third persons who have an interest in the things done (citing authority). Without this rule the business of a community could not be transacted. The public is necessarily compelled to do business with an officer who is exercising the duties and privileges of an officer under the color of right, and to say that his acts as to strangers should be void, would be productive of irreparable mischief. It would cause a suspension of business till officer's right to *de jure* was established."

In *State* v. *Miller*, 111 Mo. 542, l.c. 549, the Court said: "The provisions for appointing a temporary judge of the court was for the benefit of the public and when the conditions giving a right of appointment existed and an encumbent is in possession and active under color of right, public policy and justice require that his acts be held valid as far as they involve the interests of the public and of the third party (citing *Norton C. Shelby*, 118 U. S. 426 and many other authorities).

In 36 C. J. Page 1039, paragraph 2, it is said: "Reason for the rule: Litigants should not be permitted to try a case without objection before a special judge, taking chance upon the outcome of the trial with intentions of availing themselves of the benefit incident to favorable results and at the same time be accorded the right to question the

validity of such proceedings should an adverse verdict be rendered. And on page 1038 of 33 C. J., is the following: "Collateral attack—The acts of a *de facto* special judge cannot be overthrown in collateral attack (citing authorities)."

We invite your Honors' attention to the following, which sustained this caption:

Commonwealth v. *Stasio*, 8 N. E. 2, 923.

In re Manning 45 N. W. (Wis.) 26. The *Manning* case rests on *In re Burke*, 45 N. W. 24. We will present the syllabus of the *Burke* case, which reflects the opinion.

> "Laws of Wisconsin, 1889 C. 94, which establish the municipal court of the city and County of Ashland, was duly published March 15, 1889, and provides that it shall be in force from its publication; that a judge of said court shall be elected on the first Monday of April following, to hold office from the first Monday of January thereafter. And that in case of a vacancy, the Governor shall fill the office by appointment. On the date designated a judge was duly elected and two days thereafter the same person was appointed by the Governor to fill the office until the beginning of the electorate term. Held 'that such Court was legally in existence and said person was judge de facto thereof during the term of the appointment and that, as such, his acts were valid.'"

This case was affirmed *in re Manning*, 139 U. S. 504, in which the Court, in a very strong opinion, sustained the caption.

There are many cases to the same effect, but economy suggests that we do not cite them.

XV

We have endeavored to answer at least in principle, all of the relevant and pertinent suggestions of appellants bearing on the question of the appellate jurisdiction of this

BLEED THROUGH– POOR COPY

Court. This has necessarily made our suggestions quite lengthy, and in their preparation, because of the shortness of time, and the necessity of the work being parceled out to the several counsel, there may appear some repetition. If such is the case, we regret this necessity.

Motion to Dismiss or Affirm

WHEREFORE, appellees respectfully submit this STATEMENT showing that the questions upon which the decision in this case depends are so unsubstantial as not to need further argument, and appellees respectfully move the Court to dismiss this appeal, or in the alternative, to affirm the judgment of the Supreme Court of Missouri.

JOHN T. HARDING,
DAVID A. MURPHY,
R. CARTER TUCKER,
JOHN MURPHY,
WALTER A. RAYMOND,
Attorneys for Helen Weede, Appellee;

CHARLES M. BLACKMAR,
JAMES E. GOODRICH,
HUGH M. HILLER,
EUGENE E. BOWERS,
Attorneys for Commerce Trust Company, Appellee;

WM. DENNIS BUSH,
Attorney for B. C. Howard, Appellee;

GLEN A. WISDOM,
Attorney for William H. Kopp, Appellee.

APPENDIX

THE APPENDIX TO THE FOREGOING STATEMENT, REFERRED TO THEREIN, APPEARS ON THE FOLLOWING PAGES

INDEX TO APPENDIX

Pages

1. Moffett *v.* Moffett, et al., 131 Kan. 582, 292 Pac. 947 110-119
2. Grace Torrance Clark, et al. *v.* Helen Moffett, et al. 136 Kan. 711, 18 Pac. (2d) 585 119-133
3. Moffett, et al. *v.* Robbins, 81 Fed. (2d) 431 134-146
4. Louise McGrew Moffett, et al. *v.* R. O. Robbins, Administrator, 14 Fed. Supp. 602 146-151
5. Specification of Errors contained in a Petition for Writ of Certiorari to review the decision of the Supreme Court of Kansas in the case of Clark *v.* Moffett, 136 Kan. 711, filed in United States Supreme Court on or about June 23, 1933, and docketed therein as cause No. 181 152-154
6. Specification of Errors contained in a Petition for Writ of Certiorari to review the decision of the Tenth Circuit Court of Appeals in the case of Louise McGrew Moffett *v.* R. O. Robbins, Administrator, 81 Fed. (2d) 431, filed in the United States Supreme Court on April 11, 1936, and docketed therein as cause No. 918 154-157

No. 29,807

THOMAS S. MOFFETT, *Appellant, v.* HELEN MOFFETT, THE COMMERCE TRUST COMPANY, Executor *de monis non* of the Will and Estate of John Moffett, Deceased, and the COMMERCE TRUST COMPANY, Administrator of the Partnership Estate of Moffett Brothers et al., *Appellees*

(292 Pac. 947)

SYLLABUS BY THE COURT

1. PARTNERSHIPS—*Death of Partner—Right of Widow to Accounting—Partition and Conversion of Firm Real Es-*

BLEED THROUGH- POOR COPY

tate. Two brothers were for many years partners in the live-stock and farming business, and purchased, with partnership funds, real property which was used in the business. The partnership was terminated by the death of one of them. Partnership debts to general creditors were paid. The surviving partner brought an action to partition the partnership real property, claiming a one-half interest in it by reason of his interest in the partnership. The widow of the deceased partner, who took under the law, by answer and cross petition alleged that the partnership was indebted to the deceased partner, that the surviving partner was indebted to the partnership, and that another partnership, composed of the deceased, plaintiff and two others who were beneficiaries under the will of the deceased, was indebted to the partnership, and asked for an accounting of this indebtedness to determine the interests of the parties in the real property sought to be partitioned. *Held,* such an accounting was proper.

2. SAME—*Partition of Firm Real Estate—Parties.* In a partition action, mentioned in syllabus 1, the administrator of the partnership estate and the executor *de bonis non* of the estate of the deceased partner intervened to have adjudicated the indebtedness between the parties for the determination of the interests of the parties in the property sought to be partitioned. *Held,* that it was proper to permit them to intervene.

Appeal from Harper district court; GEORGE L. HAY, judge. Opinion filed November 8, 1930. Affirmed.

E. C. Wilcox, of Anthony, *A. E. Watson* and *Martin J. O'Donnell,* both of Kansas City, Mo., for the appellant.

B. C. Howard, of Kansas City, Mo., for appellee Commerce Trust Company; *Orlin A. Weede,* of Kansas City, Mo., for appellee Helen Moffett.

The opinion of the court was delivered by

HARVEY, *J.:*

Plaintiff has appealed from an order of the court overruling his demurrer to the answer of the defendant, Helen

Moffett, also from an order of the court permitting the Commerce Trust Company to interplead.

Plaintiff in his petition alleged that for many years he and his brother, John Moffett, were equal copartners, under the firm name of Moffett Brothers, engaged in the live-stock and farming business and in the purchase and ownership of lands used in connection with that business, the title to the land being taken, sometimes in the name of the partnership, at other times in the name of one or the other of the members of the firm; that both of the partners resided at Kansas City, Mo., where the principal office of the partnership was located; that some of the partnership lands were situated in Kansas, where they were operated in connection with the partnership business; that the partnership was dissolved August 23, 1927, by the death of John Moffett; that the real property described in the petition, situated in Harper, Anderson, Pratt, Barber and Comanche counties, Kansas, was acquired and purchased with partnership funds and used in connection with the partnership business; that by reason of plaintiff's interest in the partnership he was the owner of an undivided one-half interest in the land; that on the death of John Moffett he left surviving him his widow, Helen Moffett, but no children; that the widow had elected, both in Missouri and in Kansas, to take under the law; that John Moffett left a will under the terms of which, as construed in plaintiff's petition, plaintiff was the beneficiary to the extent of 7/144 of the property of which John Moffett died seized; that by reason of his partnership interest in the property and his interest as beneficiary under the will of his brother, plaintiff was the owner of 79/144 of the real property described in the petition; that the defendant, Helen Moffett, was the owner of an undivided one-fourth of the property, and that brothers and sisters of John Moffett, other than plaintiff, living at the time of his death were the owners respectively of an undivided 7/144 of the property; and that all debts of the partnership, owing to general creditors, had been paid. The widow of John Moffett, his brothers and sisters, other than plaintiff, and others who might claim an interest in the property, were named as

BLEED THROUGH- POOR COPY

defendants. The prayer was that the respective interests of the parties be adjudicated and determined, and that the real property be partitioned.

The defendant, Helen Moffett, answered, admitting she was the widow of John Moffett, deceased; that she had elected to take under the law; that plaintiff and John Moffett for many years prior to his death were partners under the name of Moffett Brothers; that the real property in controversy had been purchased by partnership funds and used in the partnership business, and that partnership debts owing to general creditors had been paid; but alleged that the partnership was in debt to John Moffett in a large amount, and that the plaintiff was indebted to the partnership in a substantial sum; and further alleged that prior to the death of her husband there was a partnership composed of her husband, the plaintiff in this action and two other brothers, doing business under the name of Moffett Brothers Cattle, Land and Lumber Company, which partnership was indebted to Moffett Brothers in a substantial sum, and the defendant, Helen Moffett, in her answer prayed that before the land described in the petition should be partitioned an accounting should be had so as to determine her share or interest, as well as that of the plaintiff and other defendants, in the property sought to be partitioned.

The Commerce Trust Company of Kansas City, Mo., having previously been duly appointed executor *de bonis non* of the will of John Moffett, deceased, and also as administrator of the partnership estate of Moffett Brothers in its two respective capacities, made application to be permitted to intervene and allege facts much as were alleged in the answer of Helen Moffett as to why there should be an accounting prior to the partition of the real property in controversy. These applications to intervene were allowed. It would seem the order allowing these applications is not appealable (*Wagstaff* v. *Wagstaff*, 67 Kan. 832, 72 Pac. 780; *Howard* v. *Bank*, 107 Kan. 489, 192 Pac. 746; 3 C. J. 493), while an order denying them might have been (*Ousley* v. *Osage City*, 95 Kan. 254, 147 Pac. 1110). But we pass that question, since it is not specifically raised.

While we do not deem it important to the question presented, we are told in the briefs and arguments that the members of the partnership firm of Moffett Brothers Cattle, Land and Lumber Company, other than plaintiff and John Moffett, deceased, have filed answers in which they ask for an accounting prior to the partition of the real property in controversy.

Speaking broadly, the question presented is whether there can be, or should be, an accounting as between the members of the partnership of Moffett Brothers and of the alleged indebtedness of plaintiff, and of the Moffett Brothers Cattle, Land and Lumber Company, before there is actual partition of the real property in question. In the argument counsel have separated the question, broadly stated as above, into several points, but we deem it unnecessary to dissect it very much. Appellant alleged in his petition and the appellees concede in their answer and application to intervene, that the real property sought to be partitioned was purchased with partnership funds of Moffett Brothers and used in the partnership business, and that obligations owing to general creditors have been paid.

Appellant contends that because he was an equal partner with John Moffett in the business of Moffett Brothers he is an owner of an undivided one-half of the real property in controversy. Appellees contend that notwithstanding the fact that plaintiff was an equal copartner in the firm of Moffett Brothers he is not the owner of an undivided one-half interest in the assets of the partnership, including the land in controversy, for the reason that the partnership was heavily indebted to John Moffett, and plaintiff was indebted to the partnership, and the partnership of Moffett Brothers Cattle, Land and Lumber Company was indebted to the Moffett Brothers partnership. Appellant in his petition prayed that the respective interests of the parties to the action be adjudicated and determined. Appellees ask the same result, but say that in adjudicating and determining the respective interests of parties to the land in controversy it is necessary for the court to determine the amount and take into consideration the indebtedness above referred to. Appellant argues that any sum he owes to

BLEED THROUGH– POOR COPY

appellees can be recovered in an action at law, and that such indebtedness, if any exists, does not affect plaintiff's title or interest in the real property in controversy. Appellees contend that since the real property in question was partnership property appellant has only the share or interest therein which would be shown by an accounting as between the partners of the assets of the partnership. These contentions lead to the discussion of the nature of the property of real estate when the same is a part of the assets of a partnership—whether it is to be treated with all the attributes of real property, or as being converted into personalty, and if so converted, to what extent. Much has been written on the question, first and last. The English rule that partnership real property is regarded in equity as converted into personalty for all purposes, spoken of as "out and out" conversion, after some fluctuation of judicial opinions, was, in 1890, embodied in a statute (53 & 54 Vict., c. 39, secs. 20-22). The doctrine in America is stated in Ruling Case Law as follows:

"The rule prevailing in the United States is that, to the extent that partnership real estate may be required to pay partnership obligations or to pay any balance due from one partner to another in the settlement of its affairs, and only to that extent, the share of each partner is embraced in a trust implied by law which equity, in enforcing, treats as converted into personalty. When no longer needed for partnership purposes the land is relieved from the trust growing out of the partnership relation, and all the ordinary incidents and qualities of real estate revive. In America the doctrine of equitable conversion, as applied by the courts, gives to the laws of inheritance and descent their ordinary operation. On the death of either partner, where the title is vested in both, the share of the land standing in the name of the deceased partner descends as real estate to his heirs, subject to the equity of the surviving partner to have it appropriated to accomplish the trust to which it was primarily subjected. The working out of the mutual rights which grew out of the partnership relation does not seem to require that the character of the property should be changed until the occasion arises for a

conversion, and then only to the extent required. If a portion of the land is not required for partnership purposes and the adjustment of equities it retains its character as realty. • • • Ordinarily, when a partnership is dissolved, real estate constituting part of its assets may be divided by compulsory partition, provided it appears that it will not be required to satisfy liabilities of the firm. Yet the partition of lands belonging to a firm cannot take place until its affairs are settled. • • • " (20 R. C. L., 866, 870.)

Similar statements of the doctrine prevailing in the courts of this country are made in 22 A. & E. Ency. of L., 106, 107; 30 Cyc. 625, 626; 47 C. J. 1050, *et seq.;* Mechem on Law Partnerships, §§ 169, 402, and in the many cases cited in support of the texts above referred to and additional cases collected in the American Digest system under partnerships, key number, § 246. Our own cases are in harmony with this view. (*Ravenscraft v. Pratt,* 22 Kan. 20; *Tenney v. Simpson,* 37 Kan. 353, 363, 15 Pac. 187; *Cox v. Grubb,* 47 Kan. 435, 28 Pac. 157; *English v. English,* 53 Kan. 173, 35 Pac. 1107; *Sternberg v. Larkin,* 58 Kan. 201, 48 Pac. 861; *Getty v. Larkin,* 59 Kan. 548, 53 Pac. 755; *Hazen v. Webb,* 65 Kan. 38, 68 Pac. 1096; *Goodnough v. Webber,* 75 Kan. 209, 88 Pac. 879; *Reynolds v. Roberts,* 119 Kan. 281, 237 Pac. 931.)

This American doctrine is sometimes stated from the viewpoint that upon the termination of a partnership by the death of one of the partners the title to the real property, which is a part of the assets of the partnership, passes at once to the surviving partner and to the heirs or devisees of the deceased partner, who hold it in trust for the benefit of general creditors and the adjustment of the financial interests of the partners between themselves. The other viewpoint is that the real estate, in all of its aspects, is to be treated as personal property until the creditors of the partnership have been paid and the shares of the partners as between themselves have been determined. The application of these two viewpoints reaches the same result. The first viewpoint is the one usually applied when the facts and

BLEED THROUGH– POOR COPY

circumstances of a particular case require or justify its application, and the one which both the plaintiff and the defendant, Helen Moffett, have proceeded in accordance with in this case. Both take the position that on the death of John Moffett the title to the real property which was a part of the partnership assets passed to the surviving partner and to heirs and devisees of the deceased partner. The share or interest of the respective parties in such real property can be determined, of course, only by determining the status of the partnership and the obligations of each member to it and to each other.

Appellant contends that the court does not have power to make such an accounting in the partition action. In *Sawin v. Osborn*, 87 Kan. 828, 831, 126 Pac. 1074, it was said:

"While the remedy of partition is statutory, the court in enforcing it has substantially the same powers as were exercised by courts of chancery under the former equity practice."

And, after quoting the statute:

"Under this provision the court may partition the property under the broad principles of equity which govern courts in the administration of justice." (p. 832.)

It is the general rule that a court, in decreeing partition, has power to adjust the equitable rights of all the parties interested in the estate, so far as they relate to and grow out of the relation of the parties to the common property. (*Thresher Co. v. Judd*, 104 Kan. 757, 180 Pac. 763.)

Appellant contends that the action is not brought in the proper forum for an accounting. But the plaintiff chose this forum and is in no position to complain on that ground. Appellant contends that a proper accounting, such as asked for by appellees, would require the consideration of property situated in other states—Missouri and Oklahoma. But it is a principle of law, applicable to courts of equity, that such a court, having assumed jurisdiction of the subject matter, will reach out and draw into its consideration and its determination the entire subject matter, and bring before it all the parties interested therein, in order that a

complete and effectual final decree, adjusting the rights of all parties, may be entered and enforced. (*Hazen v. Webb*, 65 Kan. 38, 68 Pac. 1096; *Appel v. Smith*, 105 Kan. 732, 185 Pac. 903; the same case on rehearing, 106 Kan. 717, 190 Pac. 8.)

It is unnecessary to say much about the applications to intervene. It is clear from the allegations in these applications and from the answer of Helen Moffett, which are taken as true for the purpose of this appeal, that it will be necessary, to a substantial extent, for the trial court to treat the real property of the partnership as personalty, and to whatever extent that is necessary to be done the intervener, in its respective capacities, is a proper party to the action. Appellant contends that the Commerce Trust Company is intervening in two capacities which are in conflict. But we think there is no such conflict as would make it difficult for the trial court to ascertain and adjudicate the respective rights of the parties.

On the whole it seems quite clear that there should be such an accounting as is prayed for by the defendant and intervener in order to determine the respective interests of the parties in the land sought to be partitioned.

The judgment of the court below is affirmed.

644.) Now we are asked to say that a fraternal benefit society may disable itself to do the very thing it has been adjudicated that it can do so that it can live and function according to the benevolent purpose for which it was organized.

The plaintiff corporation operates not only under its charter and the pertinent statutes, but also under a constitution and by-laws of its own creation and which it may amend according to a procedure therein outlined. The benefit certificate which plaintiff seeks to have approved by the commissioner of insurance provides, in effect, that as between the plaintiff and the holder of such certificates the right of plaintiff to amend its constitution and to impose and collect whatever premiums, assessments and dues are necessary to enable it to live and function in accordance with the chartered purposes of the plaintiff shall not exist.

It seems to us that to require the commissioner of insur-

BLEED THROUGH- POOR COPY

ance to approve such a contract would violate the theory and purpose for which fraternal benefit societies are founded; consequently the writ prayed for must be denied, and it is so ordered.

BURCH and HUTCHISON, JJ., not sitting.

THIELE, J., not participating.

No. 30,826

GRACE TORRANCE CLARK, Administratrix with the Will Annexed of the Estate of Thomas S. Moffett, Deceased, and LOUISE McGREW MOFFETT, *Appellants, v.* HELEN MOFFETT et al. (THE COMMERCE TRUST COMPANY, Executor de bonis non of the Estate of John Moffett, Deceased, the COMMERCE TRUST COMPANY, Administrator of the Estate of Moffett Brothers, and R. O. ROBBINS, Administrator with the Will Annexed of John Moffett, Deceased, Interveners), *Appellees.*

(18 P. 2d 555)

Syllabus by the Court

PARTNERSHIPS—*Accounting and Settlement on Death of Partner—Review of Evidence.* In an action involving a partnership accounting, the record is examined and it is *held:* (1) The evidence sustains findings that the partnership was indebted to one of its members; (2) it was not error for the court to receive in evidence, as informative but not conclusive, a summary made by accountants from the partnership books; (3) the evidence sustains the finding that the members of the partnership had agreed to pay interest on moneys belonging to a member of the firm, but used by the partnership; (4) the fact that in making out personal income-tax returns for the federal government, interest accrued but not paid was omitted from the statement of partnership income, did not abrogate the agreement between the partners

to pay interest; (5) neither the statute of nonclaim nor the statute of limitations barred the accounting.

Appeal from Harper district court; GEORGE L. HAY, judge. Opinion filed January 28, 1933. Affirmed.

E. C. Wilcox, of Anthony, *A. E. Watson*, of Shawnee, and *Martin J. O'Donnell*, of Kansas City, Mo., for the appellants.

Guy O. Neal, of Anthony, *Orlin A. Weede*, *B. C. Howard*, *Glen A. Wisdom*, all of Kansas City, Mo., *H. A. Wilkinson*, *James R. Eagleton* and *S. A. Horton*, all of Oklahoma City, Okla., for the appellees.

R. O. Robbins, of Sedan, *pro se*.

The opinion of the court was delivered by

HARVEY, J.: The partnership of Moffett Brothers, composed of John Moffett and Thomas S. Moffett, was dissolved by the death of John Moffett, August 23, 1927. John Moffett left a will, which, after making specific bequests, left the residue of his property to certain relatives. His widow elected to take under the law. The partnership owned a large amount of real property situated in several counties in Kansas and in Missouri. On August 15, 1929, the general debts of the partnership having been paid, Thomas S. Moffett brought this action to partition the Kansas land belonging to the partnership. The defendants named were the widow of John Moffett and the devisees under his will. John and Thomas S. Moffett were also in partnership with their brothers, Renwick J. Moffett and Joseph W. Moffett, under the firm name of Moffett Brothers Cattle, Land and Lumber Company. The business of this partnership was conducted principally in Oklahoma. Renwick J. and Joseph W. Moffett were beneficiaries under the will of John Moffett and were made parties defendant in the partition action. Helen Moffett, the widow of John Moffett, answered in the partition action, conceding that the lands should be partitioned, but alleged that the partnership of Moffett Brothers was indebted to John Moffett individually, that Thomas S. Moffett individually was indebted to the partnership of Moffett Brothers, and that the Moffett Brothers Cattle, Land and Lumber Company was indebted to the partner-

BLEED THROUGH- POOR COPY

ship of Moffett Brothers. These matters were set up in a cross petition, and she asked that an accounting be had of such indebtedness, and the sums, if any, found to be due taken into consideration in determining the shares of interest of the respective parties in the land to be partitioned. The Commerce Trust Company, in its dual capacity of executor *de bonis non* of the will and estate of John Moffett and as administrator of the partnership estate of Moffett Brothers, by leave of court intervened in the action, and it and other defendants sought an accounting and partition. The action came to this court on the pleadings (*Moffett v. Moffett*, 131 Kan. 582, 292 Pac. 947), where it was determined that the accounting prayed for was proper.

When the action went back to the trial court, broadly speaking, the only controversy between the parties was with respect to the accounting. The will of John Moffett had been construed as it affected some of the beneficiaries, both by this court. (*Moffett v. Moffett*, 131 Kan. 546, 292 Pac. 942) and by the supreme court of Missouri (*Zombro v. Moffett*, [Mo.] 44 S. W. 2d 149). There was no longer any controversy among the parties as to the share or interest which each of them should receive in the land to be partitioned except as the same might be modified by the accounting.

Broadly speaking, there were but three things to be determined in the accounting. *First*, were Moffett Brothers indebted to John Moffett individually at the time of his death, and if so, in what sum? *Second*, was Thomas S. Moffett indebted to the partnership of Moffett Brothers, and if so, in what sum? And *third*, was the Moffett Brothers Cattle, Land and Lumber Company indebted to Moffett Brothers, and if so, in what sum?

After hearing the evidence the trial court made exhaustive findings of fact, and found, on accounting to the date of October 31, 1931, that the estate of Moffett Brothers was indebted to the estate of John Moffett in the sum of $143,829.96; that the estate of Thomas S. Moffett (he having died after the action was brought) was indebted to the estate of Moffett Brothers in the sum of $27,399.25, and that Moffett Brothers Cattle, Land and Lumber Company was in-

debted to the estate of Moffett Brothers in the sum of $101,228.06. The court rendered judgment in accordance with these findings. The present appeal is by plaintiffs from this judgment and the findings on which it was based. On this appeal, broadly speaking, no question is raised as to the amount found by the trial court to be due from Moffett Brothers Cattle, Land and Lumber Company to the estate of Moffett Brothers. Neither is there any question raised as to the amount found by the trial court to be due from the estate of Thomas S. Moffett to the estate of Moffett Brothers. The only major question over which any controversy is presented by this appeal relates to the correctness of the trial court's finding that the partnership of Moffett Brothers was indebted to the estate of John Moffett in the sum of $143,829.96. With respect to that, broadly speaking, appellants make two contentions. *First*, that the evidence does not support the findings of the trial court; but, coupled with this is the contention that the court received incompetent evidence on that point; and, *second*, that the court erred in computing and including interest on the amount of the indebtedness of Moffett Brothers to John Moffett individually.

This controversy, so comparatively simple in its broader aspects, as above outlined, has been complicated by the manner in which the litigation has been conducted by injecting into it a number of questions relating to practice or procedure and technical questions, many of which have little or no substantial merit, with the result that the parties have presented to this court for its analysis and its consideration 1740 pages of printed abstracts and briefs. Notwithstanding the extraordinary and wholly unnecessary bulk of the matter presented, we have endeavored to go through it carefully and painstakingly, and have done so as fully as our time would permit, and will treat and dispose of all the questions presented that have any semblance of merit.

We shall take up, first, the principal question presented by this appeal. Does the evidence sustain the finding that Moffett Brothers was indebted to John Moffett? On this point the evidence may be summarized as follows: John Moffett and Thomas S. Moffett resided at Kansas City, Mo.

BLEED THROUGH- POOR COPY

They were equal partners in the firm of Moffett Brothers. When this partnership was formed is not definitely shown, but it had existed a long time, perhaps thirty years or more, when it was dissolved by the death of John Moffett. It was engaged in the ranching and live-stock business and owned and operated a number of farms and ranches and had offices in the Livestock Exchange Building at Kansas City. John Moffett spent most of his time at the office, where they had bookkeepers and other clerical help. Thomas S. Moffett spent most of his time looking after the farms and ranches and the live stock thereon, going back and forth from the office to the various ranches. Each of them had property owned individually. Both of them were members of the partnership firm of Moffett Brothers Cattle, Land and Lumber Company, which was engaged in the live-stock, land and lumber business in Oklahoma, the field work being looked after by the Oklahoma brothers, but the office business transacted at the Kansas City office. Both John and Thomas S. Moffett were members of a partnership known as Moffett Brothers & Andrews, which was also engaged in the live-stock business. One or both of them were interested as members or otherwise in four other partnerships, namely, Andrews, Lewis & Moffett, Andrews & Lewis, J. C. Lewis & Co., and Andrews & Moffett. The books of all these partnerships and of the personal business of John Moffett, and perhaps the personal business of Thomas S. Moffett, were kept in the one office at Kansas City and by the same office force. Collectively they transacted a large volume of business, amounting to many thousands of dollars each year. While notations or entries were made to identify the business of each of the partnerships or individuals, it was all entered in a common ledger which bore the name of "Moffett Brothers & Andrews Ledger." About 1924 they had a firm of accountants examine these books and open a separate set of books for the partnership of Moffett Brothers. Separate books were also opened for the partnership of Moffett Brothers Cattle, Land and Lumber Company. Separate books were opened for some, perhaps all, of the other partnerships, but that is not material here. The business of the partnership of Moffett Brothers thereafter was kept in the

books of that firm until the death of John Moffett, and thereafter to the time of the trial of this action. These books were in court at the trial, and the entries in them, the testimony concerning some of those entries, and a summary of them prepared by accountants, known in this record as "Commerce Trust Company Exhibit No. 8," constituted the evidence on which this finding was based. This evidence shows this indebtedness exactly as found by the court, hence there is no lack of evidence to sustain the finding.

Appellants complain because the court received in evidence the summary of the books made by the accountants, "Commerce Trust Company Exhibit No. 8," and contend that it was incompetent and hearsay, and they contend that without it the evidence was insufficient. Naturally the original books were voluminous. They had been brought to the court in large boxes and trunks. They had been in possession of the plaintiffs, who had helped keep the books in recent years and were familiar with them. It was appropriate for a summary to be made by some one from them, collecting and properly setting down the entries or items bearing upon the controverted issues to be determined by the court. The trial court admitted this summary in evidence as informative only and not conclusive, and permitted the parties to refer to the original books as much as they desired and gave them ample time to do so. All other evidence relating to this indebtedness, the books and entries therein which either party offered, was received by the court. There is no contention now that this summary was not an appropriate and accurate one compiled from the books of the partnership. There was no error in receiving it in evidence.

Appellants complain that the sum found due from Moffett Brothers to John Moffett individually includes interest on sums the partnership owed John Moffett. The court found there was an agreement between John and Thomas S. Moffett that interest should be paid on such sums. Appellants contend there is no evidence to show such an agreement, and that the allowance of interest was not justified. On this point the evidence was substantially as follows: The various partnerships and individuals doing business from a

BLEED THROUGH— POOR COPY

common office and keeping the record of their business in a common set of books, and all engaged in the same general line of business, frequently had occasion to borrow money in substantial sums. Sometimes these loans were made from banks; sometimes they were made from one of the other partnerships or individuals having money on hand which could be used for that purpose. The books disclosed these various loans, and always computation of interest on them. This had been done for all the years as far back as the books were examined for that purpose. There was testimony that John Moffett and Thomas S. Moffett frequently discussed in the office these various loans, the interest which should be charged by reason of them, and the entries made showing such interest charges. The books clearly show that John Moffett's individual money, sometimes in large amounts, was used by Moffett Brothers, appropriate entries being made in the books, and that he was credited with interest from time to time. At the time of his death the books of Moffett Brothers showed an indebtedness to John Moffett. A substantial part of that amount, perhaps a fourth of it, was interest which had been credited to his account from time to time. Thomas S. Moffett undertook to administer the estate of the Moffett Brothers partnership as surviving partner under the common law, and in doing so took charge of the books and made, or caused to be made, additional entries therein crediting interest, and made payments from the estate of Moffett Brothers to the personal representative of the estate of John Moffett from time to time. From all of this the court was justified in finding that there was an understanding and agreement between John Moffett and Thomas S. Moffett by which interest should be credited and paid by Moffett Brothers to John Moffett on sums which he advanced individually to the partnership.

While on this question of interest we shall dispose of the question argued of interest on the indebtedness of the partnership of Moffett Brothers Cattle, Land and Lumber Company to the partnership of Moffett Brothers. The trial court did not allow interest on that indebtedness, although the books kept at Kansas City showed interest was computed thereon and added to the account. The evidence on

this point was that this partnership was composed of the four brothers; that by its terms when formed, the two brothers, Renwick J. Moffett and Joseph W. Moffett, were to devote their time to the business in Oklahoma, the other two brothers, John Moffett and Thomas S. Moffett, were to furnish the money to finance it, and that they were to own, in equal shares, the property of the partnership in Oklahoma, and that there was no agreement among them that interest would be charged on the money so furnished. Renwick J. Moffett and Joseph W. Moffett were not at Kansas City often. They had nothing to do with keeping the books there, their attention at no time was called to the fact that on those books interest was charged to them for money advanced in the business, hence the court charged that partnership only with the money advanced by John Moffett and Thomas S. Moffett, doing business as Moffett Brothers. No serious complaint is made by anyone on this appeal of that ruling, but appellants argue that the trial court was inconsistent in charging Moffett Brothers with interest on the money advanced to it by John Moffett, and not charging interest to the Moffett Brothers Cattle, Land and Lumber Company for moneys advanced to it by John and Thomas S. Moffett, doing business as Moffett Brothers. There is no inconsistency in the court's rulings on those matters, for the one was based upon an agreement and understanding that interest would be charged and paid, and the other based upon a partnership formed with an understanding that interest would not be charged. In other words; the court's findings are based upon the agreements as shown by the evidence, and are fully borne out by the evidence.

Appellants present another argument as to why interest should not have been included in the amount which the court found to be due from Moffett Brothers to John Moffett, personally. Prior to 1924, in making out their income-tax returns to the federal government, John and Thomas S. Moffett had not furnished to the internal revenue collector statements of their partnership transaction and with the source of income therefrom. Their attention was called to that by the internal revenue collector and a request made that the partnership transactions be shown in their returns.

BLEED THROUGH- POOR COPY

Perhaps that is the reason they called in accountants and had separate books made up for the partnership business of Moffett Brothers and other partnerships in which they were interested. When these books of the partnership of Moffett Brothers were made up by the accountants they showed a sum due from the partnership to John Moffett, personally, and that a part of the sum consisted of interest accumulations. Because these interest items had been credited to John Moffett on the books of Moffett Brothers, and the books did not show they had been paid, it was deemed proper to omit them from the reports furnished the government until they were paid. There is evidence tending to show that was the appropriate method of making that report. So, the informative statement respecting the partnership required by the internal revenue department to accompany the income-tax-return statement made by John Moffett and by Thomas S. Moffett, individually, was made omitting all items of interest charges which had not been paid. Appellants attempt to make much out of this. They say John Moffett and his personal representative are estopped from claiming interest; that this statement so furnished the government amounted to an admission in pleadings and is an adjudication on the question of interest; that there is a collateral attack, and that the parties now claiming interest came into court with unclean hands. We have carefully considered all appellants have said in this connection and conclude that it has no bearing at all upon the question of whether there was an agreement between John Moffett and Thomas S. Moffett that Moffett Brothers would pay interest on sums to individual members loaned from their private funds for the partnership business. These partnership statements, requested by the federal government in connection with internal revenue reports of individuals, are requested and furnished for the information of the federal government as to the source of income of the individual taxpayers. Whether accurate or inaccurate, they do not increase or diminish the amount of tax to be paid by the taxpayer. There is no basis in the evidence for the thought that either John Moffett or Thomas S. Moffett desired to defraud the federal government in any respect in making out these tax returns or the informative

partnership statements. They were advised that the proper way to make this partnership statement was to omit interest items which had been credited or charged but which had not been paid. There is nothing in the evidence from which the court could have found that by doing so they were agreeing, as between themselves, to abandon the practice and agreement theretofore existing between them with respect to these interest charges.

It is interesting to note in this argument over interest that Thomas S. Moffett was indebted to Moffett Brothers for partnership moneys which he had used in his private business. Interest charges were made on the books against him on those items and are included in the amount found due the estate of Moffett Brothers from the estate of Thomas S. Moffett, and although one of the appellants here is the sole beneficiary under his will, no complaint is made that he is charged interest on the amount he owed. We approve the finding of the trial court with respect to all of these interest items.

Appellants question findings of the court with respect to a few of the specific items which entered into the accounting. They also objected to some of the findings of fact made by the trial court and requested additional findings which the court did not make. We have carefully examined the contentions of appellants respecting these matters and find them not to be well taken. It would serve no useful purpose to state and analyze them in detail.

Passing now to some of the other questions argued. It is argued that the claim of the personal representative of the estate of John Moffett against the estate of Moffett Brothers is barred both by the statute of nonclaim and the statute of limitation, both of Kansas and Missouri. Passing the fact that it appears this claim was timely filed in the probate court, both in Missouri and in Kansas, as found by the trial court, there are two reasons why this contention has no merit. *First,* the failure to file a claim within the time of a nonclaim statute of another state does not preclude a party from establishing that claim in an appropriate action in this state. (*Toner v. Conqueror Trust Co.,* 131 Kan. 651, 293 Pac. 745.) *Second,* neither the statute of nonclaim (*Carr v. Catlin,* 13 Kan. 393, 407) nor the statute of

BLEED THROUGH– POOR COPY

limitation is available to one of the parties to bar an appropriate accounting of a partnership before the amount due, as between the parties, is ascertained. (*Finley v. Gilmore*, 107 Kan. 349, 191 Pac. 256.)

Appellants contend that the Commerce Trust Company is without capacity to represent the Moffett Brothers partnership in this action. When the case was in this court before, one of the points determined was that it was proper for the trial court to permit the Commerce Trust Company to intervene in this action in its capacity as administrator of the partnership estate of Moffett Brothers. Ignoring the former determination of this question, appellants present two reasons in support of their contention. *First*, that the appointment was made by one who assumed to act as special judge, or judge *pro tem.*, of the probate court of Jackson county, Missouri, who was not so chosen in accordance with the constitution and statutes of Missouri, therefore his order making the appointment is void. The trial court found that his selection was made in accordance with the constitution and statutes of Missouri, as interpreted by the supreme court of that state. The finding appears to be sound. But, passing that, he was there acting as judge of the probate court and did make the appointment. No appeal has been taken from that order. The Commerce Trust Company has been acting under the appointment since December 28, 1928. He was at least a judge *de facto*. The regularity of his appointment, or his acts as judge, cannot be collaterally attacked in this proceeding. (*Briggs v. Voss*, 73 Kan. 418, 85 Pac. 571; *Keys v. Keys*, 83 Kan. 92, 109 Pac. 985.) *Second*, it is argued that even if the appointment of the Commerce Trust Company in that capacity was made, it was for Missouri only and did not authorize it to appear in Kansas. Our statute (R. S. 22-1308) authorizes an administrator of another state to sue or be sued in this state. There is no reason for having two or more persons appearing as an administrator of the partnership estate of Moffett Brothers in this action. Certainly it should not be permitted unless one is ancillary to the other and they act in harmony. If they attempted to act in conflict with each other it was proper for the trial court to recognize in this action the Commerce Trust Company as the administrator

of the partnership estate of Moffett Brothers and make its orders accordingly.

Appellants contend that the court erred in reviving this action on the death of the plaintiff. The record discloses that Thomas S. Moffett, who brought the action as plaintiff, died December 22, 1930, testate; that his widow, Louise McGrew Moffett, is sole beneficiary under his will. The will was duly probated in the probate court of Jackson county, Missouri, and his widow was named as executrix. Grace Torrance Clark was appointed administratrix with the will annexed of the estate of Thomas S. Moffett by the probate court of Wyandotte county, Kansas. Helen Moffett, the defendant and cross petitioner in this action, filed therein a motion to revive the action in the name of Louise McGrew Moffett, sole beneficiary under the will of Thomas S. Moffett, and in the name of Grace Torrance Clark as administratrix with the will annexed. Notice was served upon them that the motion to revive would come on for hearing before the court on February 6, 1931. On February 5, 1931, Louise McGrew Moffett, individually and as executrix of the estate of Thomas S. Moffett, deceased, and Grace Torrance Clark, as administratrix with the will annexed, filed an action in the circuit court of Jackson county, Missouri, and procured a temporary order restraining the defendants in this action from reviving it. This restraining order was served upon the attorneys of Helen Moffett. On February 6, when the motion to revive came up in the trial court, counsel representing Helen Moffett, who had been served with the restraining order, advised the court of the fact that the restraining order had been served upon him and of its contents. Counsel, who had previously appeared for plaintiff, announced he was appearing simply for other attorneys for plaintiff and questioned the jurisdiction of the court to proceed. He later stated he was appearing for Louise McGrew Moffett. The court inquired what objections there were to the reviver, found no substantial objections were presented, observed it was the duty of the court under the statute (R. S. 60-3211, 60-3212) to make the order if no valid objections were presented, and made an order reviving the action in the name of Grace Torrance Clark, administratrix with the will annexed of

BLEED THROUGH- POOR COPY

the estate of Thomas S. Moffett, deceased, and Louise McGrew Moffett, sole beneficiary of the will of Thomas S. Moffett, deceased. There is no error in this ruling.

Thereafter Louise McGrew Moffett filed a petition for removal to the federal court of what was alleged to be a separable controversy between herself and the defendants Renwick J. Moffett and Joseph W. Moffett with respect to the indebtedness of the estate of Moffett Brothers to the estate of John Moffett, and alleging diverse citizenship. When this was presented to the trial court it refused to order a removal of the cause. A transcript of the proceedings was duly filed in the United States district court. That court, after a hearing, ordered it to be remanded to the state court. There was, of course, no separable controversy between Louise McGrew Moffett on the one hand and Renwick J. Moffett and Joseph W. Moffett on the other with respect to the indebtedness of Moffett Brothers to the estate of John Moffett. That is a matter in which Helen Moffett and others who were parties to the partition action were interested. This was shown by pleadings on file with the court. Thomas S. Moffett had not attempted to remove this case when pleadings raising those issues were first filed. There was no error in the ruling of the trial court on this point.

Since the order of reviver, and since the attempted removal, plaintiffs, by leave of court, filed revised and amended pleadings on which the action was fully tried. The contentions made on these matters had no merit in their inception and now have less merit (if that is possible), since the action has been fully tried on revised pleadings subsequently filed.

Appellants contend the court erred in the scope of its decree: (1) By considering property situated in other states and adjudging the rights of the parties to this action with respect thereto. This was done only with respect to property conceded to be a part of the assets of the partnership of Moffett Brothers, and was necessary to a full accounting to determine the shares or interest of the parties to this action in the Kansas land sought to be partitioned herein. That the court had authority to do so, and that this is a proper case for the court to exercise such authority, was

determined on the former appeal. (*Moffett* v. *Moffett* 131 Kan. 582, 588, 292 Pac. 947.) More than that, with the equities among the parties determined by the accounting adjusted out of the Kansas properties, there is no controversy among the parties as to their respective shares to the real property situated in other states. (2) In taking to itself authority which is tantamount to the administration of the estates of the partnership of Moffett Brothers and of John Moffett and of Thomas S. Moffett, to the exclusion of and superseding the probate court of Jackson county, Missouri, and the probate courts of two or more counties in Kansas, where steps have been taken for the administration of one or more of those estates. The decree of the court is not open to this objection. The court did this only to the extent necessary to the accounting and partition, and to that extent it was proper to do so. Neither can we see that the decree in this respect operates to the detriment of any one. The personal representative of Moffett Brothers; the heirs, devisees and personal representatives of John Moffett; the sole beneficiary of the will of Thomas S. Moffett, and his Kansas personal representative, are parties to the action and bound by the decree. Indeed, it is to the advantage of the parties to have all questions relating to the accounting and partition before the court settled once and for all in one court having general jurisdiction and having power and authority to hear and determine the matter. There are no general creditors of the estate of Moffett Brothers, nor of the estate of John Moffett. We are not advised whether there are general creditors of the estate of Thomas S. Moffett, other than his indebtedness to the estate of Moffett Brothers adjudicated in this action. If there are such, we do not understand the decree of the court to prevent them from filing their claims in the probate court of Jackson county, Missouri, in the estate of Thomas S. Moffett. But since no specific question relating to that point is before us, we do not decide it. At times it is unfortunate that in this state important orders may be made by a probate court without notice to other interested parties and an opportunity for them to be heard. The probate courts have authority to require notice, but too

BLEED THROUGH- POOR COPY

frequently it is not done. Some such orders have been made in the early stages of the estates above mentioned, resulting in confusion, if not in serious detriment. The decree of the trial court will avoid such orders and will aid in the prompt and orderly determination of the rights of the parties.

Finally it is contended plaintiffs did not have a fair trial, and that this is indicated by rulings and remarks of the court as the trial progressed. We have carefully examined the record and all counsel have said on this point and find the contention to be devoid of merit. As before stated, the parties were in agreement as to the shares of the parties in the real property to be partitioned, except as they might be modified by an accounting. The accounting involved (1) the amount the Moffett Brothers Cattle, Land and Lumber Company owed Moffett Brothers; (2) the amount Thomas S. Moffett owed Moffett Brothers; and (3) the amount Moffett Brothers owed John Moffett. As to the first two of these three items, while the amounts had to be ascertained, they presented no serious controversy. The parties appear to be satisfied with the judgment concerning them. They are involved in this appeal incidentally only. The third item is the one around which the battle of the trial raged. Much feeling was displayed. What caused this, or who is to blame for it, we shall not pause to consider, if, indeed, the record discloses. Perhaps because of it many contentions were made which were not well founded. Some tactics were indulged in, the obvious purposes of which were to impede rather than to aid the orderly administration of justice. With this attitude prevalent it is fortunate that the trial was before an able and experienced trial judge who could winnow the wheat from the chaff. While doing so the court gave the parties ample time for trial and a fair opportunity in the introduction of evidence. The judgment is fully sustained by the evidence, and, as we view it, in its main features, at least, is the only one which properly could have been reached from the evidence.

The judgment is affirmed.

THIELE, J. not participating.

Moffett et al. **v.** ***Robbins,*** **No. 1307. Circuit Court of Appeals, Tenth Circuit, Jan. 15, 1936.**

1. Judgment 576(1).

Final judgment rendered by court having jurisdiction of subject-matter and parties is conclusive upon parties and their privies in subsequent action upon same cause of action as to all matters actually litigated or which might have been litigated therein, notwithstanding that judgment may have been erroneous in fact or law.

2. Judgment 720.

Judgment operates as estoppel between same parties in subsequent proceeding upon different cause of action only with respect to matters actually litigated and adjudicated in prior proceeding.

3. Courts 509

United States court cannot vacate judgment or decree of state court, nor mandate that court to do so.

4. Courts 508(3)

United States court may restrain enforcement of judgment fraudulently obtained in state court if requisite elements of federal and equitable jurisdiction exist, but in so doing, court does not review irregularities in proceedings, but considers conduct of successful party, and injunction acts upon party and does not affect judgment.

5. Courts 508(3)

United States court will restrain enforcement of judgment fraudulently obtained in state court only upon fraud extrinsic to matters tried and determined by state court which caused court to render wrong judgment.

6. Courts 508(3)

Party suing to enjoin enforcement of judgment fraudulently obtained in state court must show valid defense to cause of action on which judgment was rendered, that he was prevented by extrinsic fraud, accident, mistake, con-

BLEED THROUGH– POOR COPY

cealment, or other chicanery from presenting such defense, and that he had not been negligent in availing himself of it.

7. Courts 508(3)

Petition to enjoin enforcement of judgment of state court adjudicating indebtedness of partnership estate on ground that claim against partnership was without foundation, that executor of estate of deceased partner violated fiduciary duty in establishing claim, and that evidence produced to establish claim was unreliable, showed intrinsic fraud, and was insufficient to entitle complainant to injunction, notwithstanding allegation that matters occurred in consequence of conspiracy.

8. Courts 508(3)

Executrix of estate of deceased partner *held* not entitled to injunction against enforcement of judgment of state court establishing indebtedness of partnership on ground of secret conferences between counsel for claimants and trial judge, where trial was continued without objection after knowledge thereof and question decided on motion for new trial, and it was not alleged that judgment would have been otherwise except for conferences.

9. Courts 508(3)

Executrix of estate of deceased partner *held* not entitled to injunction against enforcement of judgment obtained in state court establishing indebtedness of partnership estate on ground of secret conferences between counsel for claimants and trial judge concerning judgment which were not known to plaintiff until after affirmance of judgment, in absence of showing that outcome of litigation was affected thereby.

10. Courts 508(3)

Executrix of estate of deceased partner *held* not entitled to injunction against enforcement of judgment obtained in state court establishing indebtedness of partnership on ground that administratrix of partnership estate was not party to action, where person who assumed to act as administratrix of partnership estate revived action in which judgment was obtained in her name as administratrix of

estate of deceased partner, and, as such, administered estate of partnership and was so regarded throughout litigation.

11. Courts 508(3)

Question whether claim against partnership had been barred by statute of another state *held* question of limitation, presenting no federal right reviewable in suit to restrain enforcement of judgment against partnership on such claim (Rev. St. Kan. 1923, 60—310; Mo. St. Ann. § 90, p. 55).

12. Courts 508(3)

Executrix of estate of deceased partner *held* not entitled to enjoin enforcement of judgment obtained in state court establishing indebtedness of partnership estate on ground that claim had been barred before judgment by statute of state in which partnership estate was administered, and hence judgment contravened full faith and credit and due process clauses of Constitution, where Supreme Court of state in which judgment was obtained had determined that claim was not barred, regardless of whether determination of state court was correct (Mo. St. Ann. § 90, p. 55; Rev. St. Kan. 1923, 60—310; Const. art. 4; Amend. 14).

13. Courts 508(3)

Executrix of estate of deceased partner *held* not entitled to restrain enforcement of judgment obtained in state court establishing indebtedness of partnership, on ground that there had been no adversary trial, where all interested parties had been joined in action and record showed that trial consumed several days, during which all questions were seemingly thoroughly considered and extended findings of facts and conclusions of law were made, and exhaustive judgment entered.

14. Judgment 407(4)

Contention that judgment was not supported by evidence can be determined only on appeal, and cannot be decided in equitable action to enjoin enforcement of judgment.

BLEED THROUGH— POOR COPY

Appeal from the District Court of the United States for the District of Kansas, Third Division; Richard J. Hopkins, Judge.

Suit by Louise McGrew Moffett, executrix of the estate of Thomas S. Moffett, deceased, and another against R. O. Robbins, administrator with the will annexed of the estate of John Moffett, deceased. From a decree (— F. Supp. —) dismissing the third amended and supplemental bill, the complainants appeal.

Affirmed.

Martin J. O'Donnell, of Kansas City, Mo. (A. E. Watson and William Buchholz, both of Kansas City, Mo., on the brief), for appellants.

Orlin A. Weede, of Kansas City, Mo. (R. O. Robbins, of Sedan, Kan., Edwin S. McAnany, John B. Pew, and Glen A. Wisdom, all of Kansas City, Mo., and Guy O. Neal, of Anthony, Kan., on the brief), for appellee.

Before Lewis, Phillips, and Bratton, Circuit Judges.

BRATTON, *Circuit Judge:*

This is an appeal from a decree dismissing the third amended and supplemental bill in a proceeding in equity instituted by Louise McGrew Moffett, individually and as executrix of the estate of Thomas S. Moffett, deceased, against R. O. Robbins, administrator with the will annexed of the estate of John Moffett, deceased. The purpose of the bill is to restrain and enjoin the enforcement of a judgment rendered by the District Court of Harper county, Kan.

John Moffett and Thomas S. Moffett were for many years prior to 1927 equal partners in a partnership association known as Moffett Bros., which owned farm lands, livestock, and other personal property situated in Kansas, Missouri, and Oklahoma. They were also associated with their brothers Renwick J. Moffett and Joseph W. Moffett in a partnership called Moffett Bros. Cattle, Land & Lumber Company, with real and personal property situated in Oklahoma, each owning an undivided one-fourth interest therein. John Moffett, a resident of Kansas City, Mo., died testate in August, 1927, and thus the partnerships were

dissolved. Six days thereafter Thomas S. Moffett was duly appointed executor of the estate of John Moffett, deceased, by the probate court of Jackson county, Mo. He thereupon assumed to administer upon the partnership assets of Moffett Bros. in Missouri, without having given the bond required by the laws of that state, and continued to do so until his removal as executor. He caused a duly authenticated copy of the will to be filed in the probate court of Chautauqua county, Kan. Defendant was thereupon appointed ancillary administrator with the will annexed of the estate of John Moffett in Kansas, and, after the requisite bond was executed and approved, letters of administration were issued to Thomas S. Moffett as surviving partner of Moffett Bros. in that state. On November 28, 1928, the probate court of Jackson county removed Thomas S. Moffett as such executor because of an alleged conflict of interest, and on the same day the Commerce Trust Company of Kansas City was appointed executor de bonis non. It gave the additional bond required for that purpose, and on December 28th was appointed administrator for the partnership of Moffett Bros., and ever since has acted as such in Missouri. Thomas S. Moffett made final settlement, delivered substantially all of the assets of the estate then in his custody to his successor, and was discharged.

Thomas S. Moffett instituted a suit in the District Court of Harper county, which had for its purpose the partition of the lands owned by Moffett Bros. in that state. Helen Moffett, surviving widow of John Moffett, answered that the lands were purchased with money of the partnership and were used in its business; that the debts of the partnership due general creditors had been paid in full; that the partnership was indebted to the estate of John Moffett in a large amount; that Thomas S. Moffett was indebted to the partnership in a substantial sum; and that Moffett Bros. Cattle, Land & Lumber Company also was indebted to the partnership. An accounting was prayed in advance of partition in order to dtermine and adjust the respective interests of all parties The Commerce Trust Company was permitted to intervene, and it alleged substantially the same facts as those set forth in the answer of Helen Moffett. Plaintiff appealed from an

BLEED THROUGH- POOR COPY

order overruling his demurrer to the answer and from the order allowing the intervention. The Supreme Court affirmed, Moffett *v.* Moffett, 131 Kan. 582, 292 P. 947, 77 A. L. R. 294. The accounting was then ordered. Thomas S. Moffett, likewise a resident of Kansas City, Mo., died testate in December, 1930, while the action was pending and before the accounting had begun. Louise McGrew Moffett, his surviving widow and sole beneficiary, was appointed executrix of his estate in Missouri, and on January 5th, thereafter the probate court of Wyandotte County Kan., appointed Grace Torrance Clark, sister of Louise McGrew Moffett, administratrix with the will annexed of the estate. The court ordered and directed her to administer upon the estate of Moffett Bros. in Kansas. She filed an authenticated copy of the proceedings and a bond in the probate court of Chautauqua county. That court approved the bond, but subsequently revoked its action and ordered R. O. Robbins, the previously appointed ancillary administrator of the estate of John Moffett, to file a like bond and thereupon to assume administration of the partnership estate.

On the motion of Helen Moffett the action for partition was revived in the name of Louise McGrew Moffett as such sole beneficiary, and Grace Torrance Clark as such administratrix with the will annexed. The accounting proceeded and at its conclusion the court made elaborate findings of fact and conclusions of law. It was found that Moffett Bros. was indebted to the estate of John Moffett in the net sum of $142,452.24; that Moffett Bros. Cattle, Land & Lumber Company was indebted to Moffett Bros. in the sum of $101,228.06; and that the estate of Thomas S. Moffett was indebted to Moffett Bros. Cattle Land & Lumber Company in the sum of $700. Judgment was entered thereon. Defendants Louise McGrew Moffett and Grace Torrance Clark appealed. The judgment was affirmed, Clark *v.* Moffett, 136 Kan. 711, 18 P.(2d) 555. Certiorari was denied (290 U. S. 642, 54 S. Ct. 61, 78 L. Ed. 558) and motion for leave to file petition for rehearing was likewise denied, 290 U. S. 602, 54 S. Ct. 237, 78 L. Ed. 528.

This action was then filed to restrain the defendant from enforcing collection of the respective sums of $142,452.24

and $101,228.06 awarded in the judgment, it being alleged that John Moffett had no valid claim against Moffett Bros.; that the time within which a claim could be asserted in Missouri had passed; that Helen Moffett, R. O. Robbins, Commerce Trust Company, and others entered into a conspiracy to establish such a claim; that in pursuance to such conspiracy they caused Thomas S. Moffett to be removed as executor of the estate of John Moffett, deceased, by falsely averring that such a claim existed which caused a conflict of interest and therefore rendered Thomas S. Moffett disqualified to act further as such executor; that Commerce Trust Company then gave the required bond and qualified as administrator for the partnership estate before the minimum time authorized by law in Missouri had expired, in order to administer the partnership estate and defeat the right of Thomas S. Moffett as surviving partner to do so; that Commerce Trust Company then filed the fictitious claim in the probate court of Missouri, and with full knowledge that it would not be sustained there intervened in the partition suit in Kansas, making the false and fraudulent contention that the partnership was indebted to the estate of John Moffett; that in doing so it violated its fiduciary duty to the estate of Moffett Bros.; that it further violated that duty by failing to present available defenses; that defendant likewise violated his obligation to the partnership by acting in concert with Commerce Trust Company and Helen Moffett throughout the trial; that the conspirators knew that the books of account on which the alleged claim was based were unreliable and untrue, but nevertheless they introduced such books in evidence, and that the court was unaware of their unreliability; that the attorneys for the so-called conspirators held several secret interviews with the trial judge, and in one of them they discussed prior litigation to which Thomas S. Moffett was a party and which terminated unfavorably to him; that plaintiff had no knowledge of such interviews until after the judgment had been affirmed; that the judgment is void because the court lacked jurisdiction of the subject-matter and lacked power to render a judgment against Commerce Trust Company as administrator of the partnership estate in Missouri for the reason that such administrator had no assets of the

BLEED THROUGH- POOR COPY

partnership in Kansas; that Louise McGrew Moffett, as executrix of the estate of Thomas S. Moffett, was not a party to the action; that Grace Torrance Clark was a party as executrix with the will annexed of the estate of Thomas S. Moffett, deceased, but not as administering the estate of Moffett Bros.; that she was not permitted to make a defense and that there was no adversary trial; that the claim on which the judgment was founded had become barred by the statute of limitations, and that there was no substantial evidence to support such judgment. The bill contains other allegations and is replete with deductions and conclusions, but this resume of its contents will suffice.

Defendant filed a motion to dismiss which challenged the sufficiency of the bill. It was sustained, and plaintiff appealed.

[1-6] It is well settled that a final judgment rendered by a court having jurisdiction of the subject-matter and parties is conclusive upon the parties and those in privity with them in a subsequent action upon the same cause of action as to all matters in fact actually litigated or which might have been litigated therein; and such a judgment operates as an estoppel between the same parties in a subsequent proceeding upon a different cause of action only with respect to the matters actually litigated and adjudicated. That ancient rule applies even though the judgment may have been erroneous in fact or law, or both. Tait *v.* Western Maryland Ry. Co., 289 U. S. 620, 53 S. Ct. 706, 77 L. Ed. 1405; Larsen *v.* Northland Transportation Co., 292 U. S. 20, 54 S. Ct. 584, 78 L. Ed. 1096; Vinson *v.* Graham (C. C. A.) 44 F. (2d) 772; Divide Creek Irrigation Dist. *v.* Hollingsworth (C. C. A.) 72 F. (2d) 859, 96 A. L. R. 937. It is equally well settled by the decisions of this court and others that a United States court cannot vacate a judgment or decree of a state court, nor mandate that court to do so. Folk *v.* Monsell (C. C. A.) 71 F. (2d) 816. It may, however, restrain a successful litigant from enjoying the fruits of a judgment fraudulently obtained in a state court if the requisite elements of federal and equity jurisdiction exist. In doing so the court does not act in review of the judgment, nor is it concerned with irregu-

larities occurring in the proceedings in the state court. It considers the conduct of the successful party there and if it is found that he committed fraud in securing the judgment, he is prevented from enjoying its benefits. The restraint acts upon the party and does not affect the judgment. Simon *v.* Southern Ry. Co., 236 U. S. 115, 35 S. Ct. 255, 59 L. Ed. 492; Wells Fargo & Co. *v.* Taylor, 254 U. S. 175, 41 S. Ct. 93, 65 L. Ed. 205; Essanay Film Mfg. Co. *v.* Kane, 258 U. S. 358, 42 S. Ct. 318, 66 L. Ed. 658; United States *v.* Mashunkashey (C. C. A.) 72 F. (2d) 847; Murrell *v.* Stock Growers' Nat. Bank (C. C. A.) 74 F. (2d) 827; Chicago, R. I. & P. Ry. Co. *v.* Callicotte (C. C. A.) 267 F. 799, 16 A. L. R. 386. But such relief will be granted only upon fraud extrinsic to the matters tried and determined by the other court and which caused the court to render a wrong judgment, such as the successful party through fraud or deception preventing the unsuccessful from presenting his case, or from attending the trial, or where his attorney was induced to betray his client's interest, or other chicanery of that kind. The submission of perjured testimony or a fraudulent instrument on which the judgment rests is not enough, because a matter of that kind is necessarily intrinsic the proceedings. United States *v.* Throckmorton, 98 U. S. 61, 25 L. Ed. 93; Luikart *v.* Farmers' Lumber Co. (C. C. A.) 38 F. (2d) 588. In order to come within the rule, it must appear by clear allegations of fact that the party asserting it had a valid defense to the cause of action on which the judgment was rendered; that he was prevented by extrinsic fraud, accident, mistake, concealment, or other chicanery from presenting such defense, and that he had not been negligent in availing himself of it. Knox County *v.* Harshman, 133 U. S. 152, 10 S. Ct. 257, 33 L. Ed. 586; Whitcomb *v.* Shultz (C. C. A.) 223 F. 268; Jenner *v.* Murray (C. C. A.) 32 F. (2d) 625; Riverside Oil & Refining Co. *v.* Dudley (C. C. A.) 33 F. (2d) 749; Continental Nat. Bank *v.* Holland Banking Co. (C. C. A.) 66 F. (2d) 823; Wheiles *v.* Aetna Life Ins. Co. (C. C. A.) 68 F. (2d) 99.

[7] Manifestly, therefore, the allegations that Thomas S. Moffett was wrongfully removed as executor of the estate of John Moffett; that the estate of John Moffett had no

BLEED THROUGH- POOR COPY

valid claim against the partnership; that the claim was fictitiously filed in Missouri with knowledge that under the law of that state it could not be maintained there; that with such knowledge Commerce Trust Company intervened in the suit for partition and accounting in an effort to have it established there; that in doing so and in failing to advance available defenses thereto, the Trust Company violated its fiduciary duty to the partnership and that the defendant likewise violated his obligation to the partnership by co-operating with the Trust Company and Helen Moffett in the action; that the books and records upon which the claim was predicated were unreliable and untrue, and that with knowledge of that fact those advocating the claim introduced them in evidence, present intrinsic fraud because all of those facts were before the state court. Those matters were involved, thoroughly litigated, and finally adjudicated there; and the charge in the present bill that they occurred in consequence of a conspiracy does not convert them into extrinsic or collateral fraud. See Toledo Scale Co. *v.* Computing Scale Co., 261 U. S. 399, 43 S. Ct. 458, 67 L. Ed. 719.

[8, 9] The remaining charge of fraud which merits consideration relates to secret conferences between the judge of the state court and counsel in the case. The allegations are insufficient for several reasons. First, it appears from the bill that one of the alleged conferences was held in the chambers of the judge during the trial; and that while it was taking place one of counsel for Louise McGrew Moffett and Grace Torrance Clark entered the chambers, became cognizant of the fact, and made some comment with reference to it. Yet no action was taken. Instead, the trial continued without objection or protest. A party litigant may not thus sit quiescent until he has suffered an adverse decision and then raise a question of this nature for the first time. Second, it is not alleged that the decree would have been otherwise, except for the conferences; and, third, the question was raised and decided on the motion for new trial. Misconduct of the prevailing parties and passion and prejudice of the judge were among the many grounds urged for a new trial. Denial of the motion and affirmance on

appeal foreclose the question. Stress is laid upon the fact that after the trial, and before the final judgment was entered, counsel went from Kansas City, Mo., to a point in Kansas and there conferred with the judge concerning certain parts of the judgment, and that such fact was not known to plaintiff until after the judgment had been affirmed. The features discussed are not shown, and neither is it shown that the outcome of the litigation was affected by it. To the contrary, it is fairly inferable that the conference, occurred after the adverse findings of fact and conclusions of law were made on January 12, 1932, and before the entry of the judgment on March 5th, thereafter.

[10] It is contended that the judgment lacks validity because Grace Torrance Clark as administratrix of the estate of Moffett Bros. was not a party to the action. She filed the bond required by the law in Kansas and assumed to act as administratrix of the estate of the partnership. The order revived the action in her name as administratrix with the will annexed of the estate of Thomas S. Moffett, but as such administratrix administering the estate of the partnership in Kansas she filed pleadings, motions, requests for authority to defray expenses incurred in the litigation with partnership funds and reports of various kinds. She so denominated herself in such pleadings, motions, requests, and reports; she acted as such administratrix of the partnership estate and was so regarded throughout the litigation in the trial court and on appeal. The judgment was rendered against her in that capacity with no complaint that she was not a party as such. A court of equity should give meager heed to the belated contrary argument now advanced.

[11, 12] Next it is urged that under a controlling statute in Missouri, the claim against the partnership had become barred and the right thereon extinguished before it was asserted in Kansas, and that for such reason the judgment contravenes article 4 of the Constitution of the United States and the Fourteenth Amendment. Section 90, Revised Statutes of Missouri 1929 provides that claims against partnership effects shall be presented within one year after the surviving partner or executor or administrator of the estate of the deceased partner files the required bond; and

BLEED THROUGH— POOR COPY

section 60—310, Revised Statutes of Kansas 1923, provides that where a cause of action between nonresidents of that state arises in another state and under the law of such state it cannot be maintained there on account of lapse of time, it likewise cannot be maintained in Kansas. The Supreme Court of Kansas considered the question, taking both statutes into account, and determined that the claim was not barred nor the right thereon extinguished. Clark *v.* Moffett, supra. The question is one of limitation, and presents no federal right which can be reviewed here. Texas & N. O. Ry. Co. *v.* Miller, 221 U. S. 408, 31 S. Ct. 534, 55 L. Ed. 789; Wood *v.* Chesborough, 228 U. S. 672, 33 S. Ct. 706, 57 L. Ed. 1018. Moreover, that court did not deny the full faith and credit due to the law in Missouri. Instead, it observed that apparently the claim had been seasonably filed in Missouri and in Kansas, and that in addition a statute of nonclaim or limitation could not be invoked by one of the parties to bar an appropriate accounting of a partnership. We have no concern here with the correctness of that construction of the statutes. Our concern ends with the perfectly apparent fact that the court accorded full faith and credit to the law of the other state. Johnson *v.* New York Life Ins. Co., 187 U. S. 491, 23 S. Ct. 194, 47 L. Ed. 273; Pennsylvania Fire Ins. Co. *v.* Gold Issue Mining & Milling Co., 243 U. S. 93, 37 S. Ct. 344, 61 L. Ed. 610.

[13] The judgment is assailed on the further ground that there was no adversary trial Louise McGrew Moffett, as sole beneficiary of the estate of Thomas S. Moffett, Grace Torrance Clark, as administratrix with the will annexed of that estate and administering the estate of Moffett Bros. in Kansas, and all others having any interest in the estate of the partnership, were parties to the action. The purpose of the proceeding was an accounting and partition; the issues were formed and the crux of the litigation concerned itself very largely with the asserted claim that the partnership was indebted to the estate of John Moffett. Louise McGrew Moffett and Grace Torrance Clark together waged vigorous but unsuccessful opposition to that claim. Counsel who represented them were paid $3,900 from the partnership funds as compensation for their service. Grace Tor-

rance Clark made such payment. The trial consumed several days; all questions were seemingly considered thoroughly; extended findings of facts and conclusions of law were made dealing with every feature of the complicated situation; and an exhaustive judgment was entered. In these circumstances, the mere allegation that there was no adversary trial is a conclusion which the record affirmatively disproves.

[14] The contention that the judgment was not supported by evidence needs little discussion. Such a question can be determined only on appeal. It cannot be decided in an equitable action to enjoin enforcement of the judgment. Harrington *v.* Denny (D. C.) 3 F. Supp. 584; Harris *v.* Bigley, 136 Iowa, 307, 111 N. W. 432; A. B. Smith Co. *v.* Bank of Holmes County (Miss.) 18 So. 847; Nashville, C. & St. L. Ry. Co. *v.* Mattingly, 101 Ky. 219, 40 S. W. 673; Burke *v.* Wheat, 22 Kan. 722; Martin *v.* Pifer, 96 Ind. 245.

Other questions are argued, but we think they are insubstantial. For the reasons indicated, the order of dismissal is affirmed.

The opinion of the District Court, District of Kansas, Third Division, dated September 4th, 1935, in Moffett, et al., *v.* Robbins, 14 Fed. Sup. 602, is as follows:

> "Suit by Louise McGrew Moffett, executrix of the estate of Thomas S. Moffett, deceased, and another against R. O. Robbins, administrator with the will annexed of the estate of John Moffett, deceased, wherein defendant filed a motion to dismiss.
>
> "Motion allowed.
>
> "Affirmed 81 F. (2d) 431.
>
> "Martin J. O'Donnell and A. E. Watson, both of Kansas City, Mo., for plaintiffs.
>
> "Orlin A. Weede, of Kansas City, Mo., and R. O. Robbins, of Sedan, Kan., for defendant.
>
> "Hopkins, District Judge.
>
> "This suit is one to enjoin the enforcement of a judgment obtained in an accounting partition suit in the District Court of Harper county, Kan. To plaintiff's bill of complaint the defendant filed various motions, and

BLEED THROUGH– POOR COPY

the issues as now presented for determination arise on defendants' motion to dismiss. This motion had been argued orally, briefed, and duly submitted.

"It is my opinion that the matters alleged in plaintiff's "Third Amended and Supplemental Bill in Equity," together with the 'amendment,' are res judicata, and that the motion to dismiss should be sustained.

"It appears that the equity accounting partition suit (No. 7374) in Harper county was originally filed by Thomas S. Moffett, August 15, 1929. Judgments were entered from which appeals twice were taken to the Kansas Supreme Court and there affirmed. Moffett *v.* Moffett, 131 Kan. 582, 292 P. 947, 77 A. L. R. 294; Clark *v.* Moffett, 136 Kan. 711, 18 P. (2d) 555, certiorari denied 290 U. S. 602, 54 S. Ct. 227, 78 L. Ed. 528; 290 U. S. 642, 54 S. Ct. 61, 78 L. Ed. 558. It appears that all matters now complained of in the amended bill and amendments thereto were either presented in the suit in the district court of Harper county, Kan., and in the appeals, or could have been presented therein.

"(1) An examination of plaintiff's amended bill disclosed that the plaintiff Louise McGrew Moffett, as sole beneficiary of Thomas S. Moffett, deceased, was a party and filed pleadings in the suit (No. 7374) in the district court of Harper county. Therefore, the judgment rendered in such suit was finding upon her in her capacity as executrix of the Thomas S. Moffett estate. See Chicago, R. I. & Ry. Co. *v.* Schendel, 270 U. S. 611, 618, 622, 46 S. Ct. 420, 70 L. Ed. 757, 53 A. L. R. 1265. Grace Torrance Clark, administratrix with the will annexed and ancillary administratrix in Kansas of the Thomas S. Moffett estate, was also a party to the suit.

"(2) The bill states that John Moffett and Thomas S. Moffett for many years prior to the death of John Moffett on August 23, 1927, were partners in the partnership known as Moffett Bros. Thomas S. Moffett, as sole surviving partner in Kansas, administered the affairs of the partnership, and when Thomas S. Moffett died December 22, 1930, the trust as to adminis-

tering the partnership affairs fell to his estate. Churchill *v.* Buck, 102 F. 38, 44 (C. C. A. 8); State ex rel. *v.* Hubbard, 199 Mo. App. 137, 203 S. W. 250; Galbraith *v.* Tracy, 153 Ill. 54, 38 N. E. 937, 28 L. R. A. 129, 46 Am. St. Rep. 867; Dayton *v.* Bartlett, 38 Ohio St. 357; Thomson *v.* Thomson, 1 Bradf. Sur. (N. Y.) 24. The plaintiff Louise McGrew Moffett alleges that Grace Torrance Clark, on behalf of the Moffett Bros. partnership, by order of court, filed a pleading in the suit (No. 7374) in the district court of Harper county; that Grace Torrance Clark signed the petition for writ of certiorari to the United States Supreme Court as 'administratrix with the will annexed of the estate of Thomas S. Moffett, deceased, administering the estate of Moffett Brothers partnership in Kansas,' and that Louise McGrew Moffett, plaintiff herein, signed the petition for writ of certiorari as 'sole beneficiary of Thomas S. Moffett, deceased.' The allegations of the bill otherwise disclose that Grace Torrance Clark represented the Moffett Bros. partnership estate as well as the personal estate of Thomas S. Moffett, deceased, in the suit in the district court of Harper county, and on appeal that plaintiff Louise McGrew Moffett, as sole beneficiary of Thomas S. Moffett, deceased, made many requests in that suit for findings of fact and conclusions of law, and a comparison of these requests with the findings of fact and conclusions of law made by the court, which are set out in the amended bill, in my opinion, precludes any theory of fraud in connection therewith. It appears also that there were findings of fact and conclusions of law made by the court, and stated in the bill of which the plaintiff Louise McGrew Moffett made no complaint upon the trial.

"In the accounting partition suit, a decree was entered on January 13, 1932, in favor of R. O. Robbins, administrator with the will annexed of the estate of John Moffett, deceased, for $142,452.24 against Grace Torrance Clark, administratrix with the will annexed of the estate of Thomas S. Moffett, deceased, and administratrix in Kansas of the Moffett Bros. partnership estate and against the Commerce Trust Company, administrator of the Moffett Bros. partnership estate.

BLEED THROUGH— POOR COPY

Complaint is chiefly made herein by plaintiff as to this last-mentioned judgment, and it appears this judgment was the one mainly contested in the state courts. In that same suit a judgment was entered on January 13, 1932, by the district court of Harper county in favor of the Commerce Trust Company, administrator of the Moffett Bros. partnership estate for $101,228.06 against the Moffett Bros. Cattle, Land & Lumber Company partnership estate, administered by Renwick J. Moffett, sole surviving partner; and judgment was also entered in favor of the Commerce Trust Company, administrator of the Moffett Bros. partnership estate, for $16,469.53 against Grace Torrance Clark, administratrix with the will annexed of the estate of Thomas S. Moffett, deceased, Helen Moffett, widow of John Moffett, and the heirs of John Moffett were parties defendant in the suit complained of.

"All parties personally submitted to the jurisdiction of the state court and filed general pleadings in the suit. In the instant case the sole parties are the plaintiff Louise McGrew Moffett, individually and as executrix of the estate of Thomas S. Moffett, deceased, and defendant R. O. Robbins, administrator with the will annexed of the estate of John Moffett, deceased.

"This third amended bill now under consideration shows that following the rendering of the decrees complained of, January 13, 1932, only one change was thereafter made by the court, which was in term time and related to conclusion of law No. 11, which has to do with the above-mentioned decree in favor of Moffett Bros. and against the Moffett Bros. Cattle, Land & Lumber Company. This change consisted in a substitution of the domiciliary administrator for the ancillary administrator of the Moffett Bros. partnership estate in the matter of taking judgment against the Moffett Bros. Cattle, Land & Lumber Company. The bill discloses this change was made following a hearing before the court and after notice had been duly given.

"(3-7) Decisions of state courts of competent jurisdiction are binding and conclusive on all other courts

of concurrent power and are not reviewable by federal district courts of concurrent and equal competent jurisdiction. The federal district courts have no appellate jurisdiction over the decisions of state courts. Such decisions of state courts ordinarily cannot be collaterally attacked, except for fraud. Fraud which entitles a party to impeach the judgment of another court of competent jurisdiction, where jurisdiction has been acquired over the parties, as in the suit complained of, must be extrinsic to the matter tried in the other suit and not there in issue. United States *v.* Throckmorton, 98 U. S. 61, 25 L. Ed. 93. And fraud cannot be alleged by general allegations, but that facts must be stated. See Simpkins Federal Practice (Rev. Ed. 1934) par. 533, p. 507. The rule is well established that when a party has a defense which he could have interposed and was not prevented from doing so by accident, fraud, or mistake, he cannot reserve that defense to some other time or forum and thus develop a multiplicity of suits and prolong litigation. Luikart *v.* Farmers' Lumber Co., 38 F. (2d) 588 (C. C. A. 10); Smith *v.* Apple, 6 F. (2d) 559 (C. C. A. 8); United States *v.* Throckmorton, 98 U. S. 61, 25 L. Ed. 93; 43 S. Ct. 458, 67 L. Ed. 719.

"(8-9) An allegation in a bill that a judgment is not supported by evidence is a mere conclusion. That a judgment is based upon evidence supporting it must be conclusively presumed in suit to enjoin enforcement thereof. Harrington *v.* Denny et al. (D. C.) 3 F. Supp. 584.

"(10, 11) Complaint is made of an order of Judge Pollock remanding the cause complained of to the district court of Harper county, Kan. The remanding order was final and cannot be brought here indirectly for review. City of Waco, Tex., *v.* United States F. & G., 67 F. (2d) 785, 786 (C. C. A. 5). In suit complained of, Clark *v.* Moffett, 136 Kans. 711, 721, 722, 18 P. (2d) 555, the question of removal and remanding was properly passed upon in the state court.

BLEED THROUGH— POOR COPY

"(12, 13) In my opinion the bill of complaint does not contain the indispensable elements of a good cause of action. National Surety Co. *v.* State Bank, 120 F. 593, 61 L. R. A. 394 (C. C. A. 8); Knox County *v.* Harshman, 133 U. S. 152, 10 S. Ct. 257, 33 L. Ed. 586; Beals *v.* Illinois, etc., R. Co., 133 U. S. 290, 295, 10 S. Ct. 314, 33 L. Ed. 608; Walker *v.* Robbins, 55 U. S. (14 How.) 584, 586, 14 L. Ed. 552. Even if the decision of the state court were erroneous and this court might have reached a different conclusion from the evidence, there would be no violation of any federal constitutional right. Owens *v.* Battenfield, 33 F. (2d) 753 (C. C. A. 8).

"(14) Nor does the application of state statutes of limitation present a federal question. Preston *v.* Chicago, 226 U. S. 447, 33 S. Ct. 177, 57 L. Ed. 293; Wood *v.* Chesborough, 228 U. S. 672, 33 S. Ct. 706, 57 L. Ed. 1018; Gaar, Scott & Co. *v.* Shannon, 223 U. S. 468, 32 S. Ct. 236, 56 L. Ed. 510; Moran *v.* Horsky, 178 U. S. 205, 20 S. Ct. 856, 44 L. Ed. 1038. Limitation statutes of another state involve nothing more than a question of local pleading and practice. Texas & N. O. R. Co. *v.* Miller, 221 U. S. 408, 31 S. Ct. 534, 55 L. Ed. 789.

"(15) I am of the opinion the plaintiff has had her day in court and issues as presented in her bill are now res judicata. Coleman *v.* Apple, 298 F. 718, 720, 721 (C. C. A. 8); United States *v.* Throckmorton, 98 U. S. 61, 25 L. Ed. 93.

"The motion to dismiss is allowed."

A petition for writ of certiorari to review the decision of the Supreme Court of Kansas in the case of Clark *v.* Moffett, 135 Kan. 711, was filed in the United States Supreme Court on or about June 23, 1933, was docketed therein as cause No. 181, and on pages 25 to 28 thereof, both inclusive, appellants made the following Specification of Errors:

"IV

"Specification of Errors

"THE SUPREME COURT OF KANSAS ERRED:

"1. The judgments were without evidence to support them, and therefore are arbitrary and baseless, and denied to petitioners and each of them the rights guaranteed by the due process and equal protection clauses of Section 1 of the Fourteenth Amendment.

"2. Said judgment failed and refused to give full faith and credit to the public acts, records and judicial proceedings of the State of Missouri as to the statutes of non-claim and limitations and the judicial decisions of Missouri construing same, specially set up and claimed by petitioners under Section 1, Article IV of the Constitution, the protection of which petitioners invoked; and said court failed and refused to apply said Missouri law and decisions, as required by Sec. 60-310 R. S. Kan. 1923, and thereby denied petitioners the protection of the due process and equal protection clauses of the Fourteenth Amendment.

"3. In holding that the claim made against Moffett Brothers estate in favor of the estate of John Moffett was not barred by the statutes of non-claim and limitations of Missouri and Kansas.

"4. In holding that the Commerce Trust Company, as domiciliary administrator of John Moffett's estate and of Moffett Brothers partnership estate, could prosecute a claim in Kansas, which accrued to it (and was barred) in Missouri, in favor of the estate of John Moffett (a deceased partner) against the partnership estate, and in holding that the said Commerce Trust Company could, as representative of John Moffett's estate, prosecute a claim against itself as representative of Moffett Brothers estate, notwithstanding there was an ancillary administratrix of said partnership estate in court and attempting to defend against the said claim.

BLEED THROUGH- POOR COPY

"5. In affirming a judgment in favor of the ancillary administrator in Kansas of the estate of John Moffett upon an alleged claim which, if ever, accrued to the domiciliary administrator in Missouri, and was prosecuted by it against itself, and against the ancillary administratrix of the partnership estate in Kansas, notwithstanding the ancillary administrator of John Moffett's estate in Kansas did not appear in said action and present any claim against said partnership estate until the lapse of three years and five months after the administration on the partnership estate was begun in Kansas, and long after said alleged claim was barred by the Statutes of Limitations of Kansas.

"6. In holding that there was any indebtedness owing to the estate of John Moffett from Moffett Brothers partnership estate, and that there was any indebtedness owing by Thomas S. Moffett's estate to Moffett Brothers partnership estate.

"7. In holding that John Moffett, by depositing money in Moffett Brothers partnership bank account and immediately checking it out for other than partnership purposes, without knowledge or consent, or without being ratified by Thomas S. Moffett, the other partner, creates a liability upon the partnership in his favor.

"8. In holding that there was an agreement to pay interest upon yearly balances as between John Moffett and Thomas S. Moffett, sole members of Moffett Brothers, in the absence of any evidence of such an agreement.

"9. In holding that Moffett Brothers partnership estate was liable to the estate of John Moffett for interest either before or after his death and contrary to the evidence of the five witnesses testifying on the subject.

"10. In holding that Commerce Trust Company's Exhibit No. 8 was competent, and receiving same in evidence over objections.

"11. In holding that income tax returns for the years 1919 to 1923, inclusive, made to the Government, and the ruling and adjudication of the Commissioner thereon approving same, were without probative force and not binding upon the defendants and interveners, and did not constitute an estoppel.

"12. In affirming the action of the trial court in ousting the Probate Courts of Missouri and Kansas of jurisdiction and taking over to itself the administration of the estates of John Moffett, Thomas S. Moffett and Moffett Brothers partnership.

"13. In decreeing that the judgment is a lien and charge upon real estate belonging to Moffett Brothers in Missouri.

"14. In holding that it was proper to inquire into and have an accounting as between Moffett Brothers partnership estate and the Moffett Brothers Cattle, Land and Lumber Company (a separate and distinct partnership), in this proceeding.

"15. In refusing to grant petitioners' motion for a rehearing.

"16. In refusing to examine the record and determine the facts for itself, and render the judgment thereon that should have been rendered."

Petition for Writ of Certiorari to review the case of Louise McGrew Moffett *vs.* R. O. Robbins, Administrator, 81 Fed. (2d) 431, was filed in this Court on April 11, 1936, and was docketed therein as cause No. 918 and on pages 33 to 35 thereof, both inclusive, the appellants made the following Specification of Errors:

"IV

"Specification of Errors

"1. The Court of Appeals erred in affirming the decree of the lower court dismissing plaintiff's bill.

"2. The Court of Appeals erred in not reversing the decree of the lower court.

BLEED THROUGH– POOR COPY

"3. The court erred in declining to hold that Section 22-1308 R. S. Kan. 1923 (R. 10, 4-5), in so far as its provisions authorized a judgment to be rendered against a foreign administrator without any assets of the estate he represented in his possession or control in the state of the forum was unconstitutional and void, being in violation of the Fifth Amendment to the Constitution of the United States and Section 1 of the Fourteenth Amendment to the Constitution of the United States prohibiting the deprivation of property without due process of law.

"4. The court erred in holding that said provisions of said Section 22-1308 R. S. Kan. 1923 (R. 10) were constitutional and authorized the rendition of a judgment against a foreign domiciliary administrator under the conditions stated in the next preceding assignment.

"5. The court erred in holding that the alleged cause of action upon which said judgment in the district court of Harper County, Kansas, was rendered ever accrued to or vested in the respondent.

"6. The court erred in holding that said judgment of $145,133.05 (R. 8) was valid notwithstanding the Commerce Trust Company, the claimed foreign domiciliary administrator of Moffett Brothers had no property of said Moffett Brothers estate in its possession or under its control in the State of Kansas, and notwithstanding the cause of action had never been revived against Grace Torrance Clark as ancillary administratrix of Moffett Brothers in Kansas (R. 7, 8).

"7. The court erred in not holding that Section 90 R. S. Mo. 1929, together with Sec. 60-310 R. S. Kan. 1923 (R. 10) extinguished the right and remedy on the alleged claim on which the judgment herein is based, for said statute extinguished the remedy as well as the right, if any ever existed (R. 11), and the ruling of the court denied to plaintiffs the due process of law and equal protection of the laws, contrary to the prohibition contained in Section 1 of the Fourteenth Amend-

ment to the Constitution of the United States; and also said ruling failed to give full faith and credit to the public acts, records and judicial proceedings of the State of Missouri.

"8. The court erred in holding that a judgment, the enforcement and collection of which was sought to be enjoined on the grounds of collusion, conspiracy and fraud, could be set up as a complete defense thereto.

"9. The court erred in holding that the facts alleged in the bill brought the case within the general rule announced in *United States* v. *Throckmorton*, 98 U. S. 61, and was not within the exceptions to the general rule noted in said case.

"10. The court erred in holding that the acts and conduct of the respondent and his co-conspirators stated in the bill did not constitute extrinsic fraud and entitle the plaintiffs to relief, when it is conclusively shown by the bill that a fiduciary relationship existed and that respondent and its co-conspirator the Commerce Trust Company were recreant to the duties they owed petitioners in virtue of such relationship (R. 26).

"11. The court erred in holding the same representative of two different estates (individual and partnership) could prosecute a claim in favor of one (individual) and against the other (partnership) and make no defense for the partnership (R. 28).

"12. The court erred in holding that a representative of a deceased partner in Missouri could acquire the right to administer upon the partnership estate by filing a bond 24 days after its appointment as the personal representative of the deceased partner when the statute of said state required it to wait 30 days after its appointment before filing a bond to administer the partnership effects (R. 14).

"13. The court erred in holding that the plaintiffs were not entitled to the relief prayed for.

"14. The court erred in not holding that there was no adversary trial.

BLEED THROUGH— POOR COPY

"15. The court erred in holding that Grace Torrance Clark was a party to said action in the state court of Kansas (R. 224, 225) notwithstanding the case was never revived against her as the representative of the partnership estate (R. 7).

"16. The court erred in holding that petitioners were not protected by the constitutional provisions referred to in the bill."

Filed July 10, 1946. Marion Spicer, Clerk Supreme Court.

IN THE SUPREME COURT OF THE UNITED STATES

No. —

LOUISE MCGREW MOFFETT and LOUISE MCGREW MOFFETT as Executrix of the Estate of Thomas S. Moffett, Deceased, *Appellants,*

vs.

COMMERCE TRUST COMPANY, a Corporation, HELEN WEEDE, B. C. HOWARD and WILLIAM H. KOPP, *Appellees*

To the Clerk of the Supreme Court of Missouri:

ERRATUM

Since the service on July 6, 1946, upon appellants, of appellees "SUGGESTIONS OPPOSING JURISDICTION, AND MOTION TO DISMISS APPEAL OR AFFIRM JUDGMENT," we have found an error therein which we desire to correct at this time, as follows:

On page 66 of appellees' SUGGESTIONS OPPOSING JURISDICTION, etc., there appears the following:

"1. PETITION FOR AN ACCOUNTING AND PARTITION, filed by Thomas S. Moffett in the Harper County District Court (*113 to *122) both inclusive)."

This is erroneous, and should have read:

"1. PETITION FOR AN ACCOUNTING AND PARTITION filed on or about the 8th day of August, 1929, by Thomas S. Moffett, in the Circuit Court of Clay County, Missouri (*1012) (*1013 to 1022) both inclusive."

(The following numbers 2, 3, 4, 5 and 6 set forth on Said page 66 refer to documents, pleadings and proceedings in the District Court of Harper County, Kansas.)

We therefore respectfully request you to include this ERRATUM in your transcript to the Supreme Court of the United States.

JOHN T. HARDING,
DAVID A. MURPHY,
R. CARTER TUCKER,
JOHN MURPHY,
WALTER A. RAYMOND,
Attorneys for Helen Weede,
Appellee;
CHARLES M. BLACKMAR,
JAMES E. GOODRICH,
HUGH M. HILLER,
EUGENE E. BOWERS,
Attorneys for Commerce Trust Company,
Appellee;
WM. DENNIS BUSH,
Attorney for B. C. Howard,
Appellee;
GLEN A. WISDOM,
Attorney for William H. Kopp,
Appellee.

Receipt of a copy of the foregoing Erratum is hereby acknowledged, at Kansas City, Missouri, this 9th day of July, 1946.

A. E. WATSON,
MARTIN J. O'DONNELL,
Attorneys for Appellants.

BLEED THROUGH= POOR COPY